Supreme Court, U.S.
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No. 10-127

In The Supreme Court of the United States

WILLIAM IREY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in holding a below-guideline sentence to be substantively unreasonable and ordering the district court to impose a 30-year guideline sentence on remand, the Eleventh Circuit effectively applied *de novo* review, in conflict with the "deferential abuse of discretion" standard of review adopted by this Court in *Booker* and applied by other circuit courts.

II. Whether the Eleventh Circuit exceeded its authority by delaying the issuance of the mandate without providing the parties with notice of its intention to do so and abused its discretion by failing to take any action for more than four months after the court issued its original panel decision.

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DECISION BELOW

The decision of the panel of the Eleventh Circuit Court of Appeals, affirming Petitioner Irey's sentence, is reported at 563 F.3d 1223 (11th Cir. 2009) (App:258-266). The *en banc* decision, vacating and remanding with instructions to impose a 30-year guideline sentence, is reported at 612 F.3d 1160 (11th Cir. 2010) (App:1-257).

JURISDICTION

Petitioner seeks review of the *en banc* decision of the July 29, 2010 Eleventh Circuit Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) by the timely filing of this petition , pursuant to this Court's October 12, 2010 order extending the time to file the petition until November 24, 2010.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

> law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 3553(a) of Title 18, United States Code, provides:

> Factors to be considered in imposing a sentence.–The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed–
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other

correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–
(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

Irey was indicted on, and pled guilty to, one count of producing child pornography. His plea agreement allowed for a sentence between 15 and 30 years' imprisonment under the terms of 18 U.S.C. §2251(c). At sentencing, the district court explicitly noted that the statutory maximum was 30 years and the minimum mandatory was 15 years' imprisonment. The district court properly calculated the advisory guideline range at level 43, which included 14 levels based on several aggravating factors, criminal history category I. Because the statutory maximum was less than the guideline range of "life," the guideline range

became 30 years. *See* USSG §5G1.1(a). While recognizing that the guidelines are advisory, the district court stated that they were the "benchmark . . . to be kept in mind throughout the analysis of the 3553(a) factors." App:313. The court recognized that the guidelines were "an important element of my sentencing calculus. But what I need to do after determining the guideline score is to look at the other 3553(a) factors on an individualized basis in an effort to determine an appropriate sentence for this particular case." App:314.

The district court received testimony from eight character witnesses. The court also heard testimony and received evidence from expert witnesses regarding Irey's mental disorder, likelihood of recidivism, and amenability to treatment. The government presented no witnesses or evidence regarding Irey's illness or risk of recidivism. Based on the evidence presented, the district court made credibility choices and findings of fact, and addressed each of the §3553(a) factors in light of its findings.

The court sentenced Irey to 210 months imprisonment after considering the seriousness of the offense, §3553(2)(a), Irey's history and characteristics, §3553(a)(1), including his advanced age at the time of release, mental disorder, amenability to treatment, and "low risk of recidivism." App:314-17. The district court credited the testimony received from the several character witnesses, finding that, "by all accounts," Irey was a good husband, father, and friend, and "a good person to his community," App:315, and that he had strong family support.

The district court observed that a "stiff" and "serious" sentence was consistent with the goals of reflecting the seriousness of the offense, 18 U.S.C. §3553(a)(2)(A), and affording adequate deterrence, *id.* §3553(a)(2)(B). App:316. It found that the need to protect the public from further crimes of the defendant did not require a sentence beyond the statutory mandatory minimum, in light of Irey's age, acceptance of responsibility, amenability to treatment, and low risk of recidivism upon release. App:316-17. The court also mentioned the need to promote respect for the law and provide just punishment. App:317.

The court concluded that "a 30-year sentence, given the personal factors I have touched upon, is greater than necessary to accomplish the statutory objectives." App:317. The court also stated, however, that a sentence above the mandatory minimum was needed "in light of the seriousness of the crimes." App: 317. The district court sentenced Irey to 210 months' (17½ years') imprisonment, followed by a life term of supervised release with numerous special conditions and restrictions. App:317.

The government did not object to any of the court's specific factual findings. It simply objected to the "extent of the variance," arguing that it was "unreasonable" based on the seriousness and long-term nature of the offense. App:320. The government appealed the sentence, arguing that it was substantively unreasonable. It did not argue that the district court committed any procedural error and did not challenge any of the district court's factual findings. On March 30, 2009, after briefing and oral

argument, a panel of the Eleventh Circuit unanimously affirmed the sentence. App:258-66.

The panel reviewed the sentencing transcript and found that "the district judge took this sentencing seriously and proceeded thoughtfully: the sentence was reasoned." App:263. The district court "correctly calculated the guidelines sentence," "was aware of the statutory maximum and minimum sentences[,]" "stated that his consideration began with the guidelines and then incorporated the section 3553(a) factors[,]" and "directly discussed . . . on the record" "the specific factors the government claims that the district court did not adequately consider[.]" App:263-64 The panel concluded:

> We appreciate that some people may feel that no sentence would be too harsh for this crime. But that is not the law [and] this many years is a substantial portion of a human life and no serious person should regard it as a trifle. . . .
>
> * * *
>
> Sentencing is difficult work. The district judge faced Defendant and saw and heard what was presented at the sentencing hearing. The district judge, on the record, reasoned through the sentencing factors. The district judge then imposed on Defendant a sentence of imprisonment that is years beyond the

> minimum sentence that the pertinent criminal statute sets out as a minimum and, in addition, imposed a lifetime of supervised release.
>
> If we were responsible for sentencing Defendant in the first instance, we might have imposed a different sentence: we clearly believe that sentences other than the one actually imposed might also be reasonable. But we must respect the district court as the sentencer, and we accept that the sentence imposed by the district court is within the outside borders of reasonable sentences for this case. We cannot conclude that the sentencing judge abused his discretion. The government has not met its burden on appeal.

App:264-65.

The government did not seek rehearing, rehearing *en banc*, or certiorari review. On August 12, 2009, after the deadline for petitioning for any further review, the Eleventh Circuit *sua sponte* set this case for rehearing *en banc*, vacating the panel decision. App:322-23.

On July 29, 2010, the Eleventh Circuit issued an *en banc* decision vacating the sentence and remanding with instructions that the district court resentence Irey to a 30-year guideline sentence. App:135-36. In

order to do so, the majority applied a three-pronged "abuse-of-discretion standard":

> A district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors.

App:55 (internal quotation and citation omitted). The court explained that in determining whether the district court abused its discretion under the third prong, "we are 'required to make the [sentencing] calculus ourselves,'" App:56, and "can and should consider 'additional salient facts that were elicited, and uncontroverted.'" App:57. The court then declared that "the importance of facts in light of the §3553(a) factors is not itself a question of fact but instead is an issue of law." App:57.

As part of its review under this standard, the court also applied the standard for "departures" when reviewing the district court's consideration of mitigating factors under §3553(a); transformed the district court's consideration of the defendant's mental disorder as a mitigating factor under §3553(a)(1)&(2) into a categorical "view" that the guideline is too harsh, allowing it to exercise "closer review"; and engaged in independent factfinding regarding the defendant's character, mental disorder, likelihood of recidivism, and general deterrence based on evidence not presented to the district court. Based on this

review, the court determined that the district court's justifications were "insufficiently compelling to support *any* variance." App:72 (emphasis added).

The *en banc* majority concluded: "Because we have determined that a downward deviation from the guidelines range in this case is unreasonable, it follows that the only action on remand that will be consistent with this opinion is resentencing within the guidelines range, which necessarily means a sentence of 30 years." App:135.

Nearly half the members of the court sharply disagreed. Judge Edmondson, writing for four of five dissenting judges, criticized the majority for applying, in effect, *de novo* review:

> [T]he deferential abuse-of-discretion standard (while certainly no "any evidence" rule or scintilla rule) calls for nothing more than some reasonable basis in the record for the District Judge's decision. . . . I submit that an appellate court's reweighing of the evidence or giving the facts a different construction – to grant something in the record more or less value than the District Judge did and so to conclude that the record overall weighs more heavily for a higher sentence – smacks of a kind of *de novo* review à la the Eighth Circuit's approach in *Gall:* the appellate court oversteps its authority.

App:242-23 (Edmondson, Birch, Barkett, Martin, JJ., dissenting). Another group of dissenting judges criticized the majority's independent factfinding in order to arrogate to itself the role of sentencer:

> [T]he majority – based on its own finding of facts and credibility determinations – simply disagrees with the district judge's conclusion that seventeen years followed by a lifetime of supervised release is an appropriate sentence for Irey. . . . [T]he majority is not 'reviewing' the district judge's judgment but rather is substituting its own and is assuming the role that the prosecutor failed to perform in presenting evidence that could arguably support a longer sentence.

App:255-57 (Barkett, Birch, Martin, J.J., dissenting); *see also* App:139, 213, 214, 227 (Tjoflat, J., concurring and dissenting) (condemning the majority for "assum[ing] the role of resentencer"); App:219-20 (stating majority's "approach amounts to *de novo* review in the guise of abuse of discretion").

REASONS FOR GRANTING THE WRIT

I.

In holding a below-guideline sentence to be substantively unreasonable and ordering the district court to impose a 30-year guideline sentence on remand, the Eleventh Circuit effectively applied *de novo* review, in conflict with the "deferential abuse of discretion" standard of review adopted by this Court in *Booker* and applied by other circuit courts.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court excised the *de novo* standard of review at 18 U.S.C. §3742(e) and replaced it with a highly deferential abuse-of-discretion standard familiar to courts of appeals. In a sharply divided eight-to-five decision, the Eleventh Circuit applied what it called an "abuse-of-discretion" standard, but operating in effect as *de novo* review, when it independently and conclusively reweighed the §3553(a) factors to conclude that the guideline sentence of 30 years was the *only* substantively reasonable sentence that could be imposed in this case. Adopting the same analytical approach used by the Eighth Circuit in *Gall*, the Eleventh Circuit did just what the Eighth Circuit did in *Gall* when it reweighed factors in order to conclusively rule that only a sentence of imprisonment could be imposed. Since this Court reversed that decision, no other appellate court has mandated that the district court impose a particular sentence on remand, much less a sentence within the guideline range, which is very often based on judicial factfinding.

Certiorari review is needed because the standard of review stated and applied by the Eleventh Circuit is in direct conflict with the standard of review described and applied in this Court's decisions and is in direct conflict with the standard of review applied by other appellate courts. The proper standard of review is an important federal question. The erroneous standard used here violates the *Booker* remedy and the Sixth Amendment by effectively reinstating the excised *de novo* standard of review and permitting a court of appeals to mandate a guideline sentence based on judicial factfinding. If not corrected by this Court, this erroneous standard of review will affect many thousands of defendants who are sentenced within the Eleventh Circuit each year. *See* U.S. Sent'g Comm'n, Statistical Information Packet, Fiscal Year 2009, Eleventh Circuit, tbl.1 (7,397 defendants sentenced in the Eleventh Circuit); Judicial Business of the United States Courts, 2009 Annual Report of the Director, tbl.B-1 (2,548 criminal appeals in the Eleventh Circuit); *Rita v. United States*, 551 U.S. 338, 354 (2007) (acknowledging that standard of review influences sentencing in the district court).

A. Mandating a particular sentence on remand is in direct conflict with this Court's decision in *Gall*, and in many cases would violate the Sixth Amendment

In *Gall*, the Eighth Circuit ruled that the district court "gave too much weight" to a relevant factor, "did not properly weigh" another factor, "failed to consider a relevant factor that should have received significant weight," "placed too much emphasis" on another factor, and substituted its own judgment that a sentence of probation "lies outside the limited range of choice dictated by the facts of the case," effectively ordering a sentence of imprisonment. *United States v. Gall*, 446 F.3d 884, 889-90 (8th Cir.2006). This Court reversed that decision, stating that the Eighth Circuit gave "virtually no deference to the District Court's decision." *Gall v. United States*, 552 U.S. 38, 56 (2007). This Court recognized that "[a]lthough the Court of Appeals correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an analysis that more closely resembled *de novo* review of the facts presented and determined that, in its view, the degree of variance was not warranted." *Id.* at 56. But "it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the §3553(a) factors, on the whole, justified the sentence." *Id.* at 59-60.

Just as in *Gall*, the Eleventh Circuit stated that the standard of review is abuse of discretion, but then

reweighed factors already considered and weighed by the district court, considered and weighed factors it decided the district court had not given proper weight, and conclusively restricted the range of options available to the district court on remand. But the Eleventh Circuit went even further, dictating an exact term of imprisonment within the advisory guideline range. In effect, the Eleventh Circuit acted as *de novo* resentencer.

In addition, because in many cases the advisory guideline range is based on contested judicial factfinding, ordering the district court to impose a guideline sentence on remand would have the effect of requiring it to impose a sentence based on facts not found by a jury or admitted by the defendant, in violation of the Sixth Amendment.

B. The Eleventh Circuit effectively applied a *de novo* standard of review instead of the requisite abuse-of-discretion standard adopted by this Court in *Booker*.

To justify resentencing Irey to a 30-year guideline sentence, the Eleventh Circuit misstated the applicable abuse-of-discretion standard and instead applied an abuse-of-discretion standard drawn from unrelated contexts and uninformed by the policies that shape the abuse-of-discretion standard adopted by this Court in *Booker* for the review of sentencing decisions.

1. The abuse-of-discretion standard adopted in *Booker*.

"There is no such thing as *one* abuse of discretion standard." Childress & Davis, 1 *Federal Standards of Review* §4.01[3]. The applicable abuse-of-discretion standard in any given context is found in "the body of case law on the issue," *id.*, and is necessarily informed by the policies and practical considerations surrounding the determination at issue. *See, e.g.*, *United States v. Cavera*, 550 F.3d 180, 188 (2d Cir.2009) (*en banc*).[1]

When this Court excised the *de novo* standard of review at 18 U.S.C. §3742(e), it held that instead, sentences should be reviewed for "reasonableness," a "standard consistent with appellate sentencing practice during the last two decades." *Booker*, 543 U.S at 261-62. The Court adopted this standard based on the structure of §3553(a); on practical considerations regarding the judicial actor best suited to decide the issues under §3553(a); and on the pre-2003 standard of review for departures and sentences with no applicable guideline, §3742(e) (2000 ed.). *Id.* at 260-62 (citing *Pierce v. Underwood*, 487 U.S. 552, 558-60 (1988); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403-05 (1990); and *Koon v. United States*, 518 U.S. 81, 99 (1996)). As Justice Stevens explained in *Rita*, "*Booker* restored the abuse-of-discretion standard identified in three earlier cases: *Pierce v. Underwood*

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[1] *See also United States v. Tomko*, 562 F.3d 558, 565 (3d Cir. 2009)(*en banc*); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 n.4 (2d Cir.2001).

[], *Cooter & Gell* [], and *Koon*." 551 U.S. at 362 (Stevens, J., concurring).

In those cases, the Court explained that the abuse-of-discretion standard is best suited to review the district court's resolution of fact-dependent legal questions involving "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce*, 487 U.S. at 561-62; *Cooter & Gell*, 496 U.S. at 401, 403 (district court must apply a "fact-dependent legal standard" regarding issues "rooted in factual determinations" and thus its "rulings on legal issues should be reviewed deferentially"); *Koon*, 518 U.S. at 98 ("district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience"). As a matter of the "sound administration of justice," the district courts are "better positioned" to decide such issues, *Pierce*, 487 U.S. at 559-60, having "an institutional advantage over appellate courts," *Koon*, 518 U.S. at 98. In addition, "such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court." *Cooter & Gell*, 496 U.S. at 401-02. In the particular context of the Sentencing Reform Act, applying an abuse of discretion standard provides the Sentencing Commission with "an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case." *Koon*, 518 U.S. at 99 (internal quotation marks omitted).

This Court's decisions make clear that review for abuse of discretion under the standard adopted for

sentencing appeals after *Booker* means that the appellate court reviews deferentially not only the district court's factual findings, but also its fact-dependent *legal determination* of the appropriate sentence under §3553(a), which includes the district court's weighing of the relevant factors. The standard adopted is driven by considerations particular to the fact-dependent determination of the appropriate sentence under §3553(a) and the relative institutional vantage points of the courts.

2. The abuse-of-discretion standard elaborated after *Booker*.

In *Gall*, this Court emphasized that its "explanation of 'reasonableness' review" in *Booker* "made it pellucidly clear that the familiar abuse-of-discretion standard" "applies to *all* sentencing decisions." *Gall*, 552 U.S. at 41, 46. If, as here, there is no significant procedural error, the appellate court "should consider the substantive reasonableness of the sentence . . . under an abuse-of-discretion standard." *Id.* at 51. When doing so, it "will, of course, take into account the totality of the circumstances, including the extent of any variance." *Id.* While the district court "must ensure that the justification is sufficiently compelling to support the degree of [any] variance," *id.* at 50, the appellate court may not itself require "compelling justifications" for the variance, but only that it was "reasonable." *Id.* at 41, 51, 59-60; *see also Booker*, 543 U.S. at 260-62; *Rita*, 551 U.S. at 338. It "must give due deference to the decision that the §3553(a) factors, on a whole, justify the extent of the variance." *Gall*, 552 U.S. at 50. It may not substitute

its own judgment for that of the district court by reversing because it "might reasonably have concluded that a different sentence was appropriate[.]" *Id.*

The Court rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range" and "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." *Id.* at 47. Further, appellate courts may not presume sentences outside the guideline range to be unreasonable, *id.*, or apply "a heightened standard of review to sentences outside the Guidelines range." *Id.* at 49. Appellate courts may not "grant greater factfinding leeway to [the Sentencing Commission] than to [the] district judge." *Rita*, 551 U.S. at 347. The appellate court thus reviews deferentially a district court's decision to disagree with a guideline based on its finding, supported by evidence, that it is not the product of the Sentencing Commission's "characteristic institutional role," fails to "take account of empirical data and national experience," and is, "in the District Court's judgment," "greater than necessary to accomplish the purposes of sentencing set forth in 18 U.S.C. §3553(a)." *Kimbrough v. United States*, 552 U.S. 85, 92-93, 109 (2007).

This Court emphasized that "[p]ractical considerations" underlie the abuse-of-discretion standard:

> The sentencing judge is in a superior position to find facts and judge their

> import under §3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record. The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. Moreover, [d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.

Gall, 552 U.S. at 51-52 (internal quotation marks and citations omitted); *see also Rita*, 551 U.S. at 357-58. The deferential standard also promotes the important policy goal of providing the Sentencing Commission with feedback from judges regarding the appropriate sentence in individual cases, which in turn will inform the "continuous evolution" of the guidelines. *Booker*, 543 U.S. at 263; *Rita* 551 U.S. at 350, 357-58; *Kimbrough*, 552 U.S. at 107.

3. The Eleventh Circuit's effective *de novo* standard.

Although the Eleventh Circuit in this case duly recited that it was to apply "the familiar abuse-of-discretion standard," App:54-55, 63, it actually applied an *unfamiliar* abuse-of-discretion standard operating in effect as *de novo* review. The Eleventh Circuit crafted this standard by selectively importing and stringing together standards from unrelated contexts, including the same standard used by the Eighth Circuit in *Gall*. This standard would allow the court of appeals

- to reweigh the §3553(a) factors under a requirement that it "make the [sentencing] calculus" itself, App:56, 91;

- comb the record beyond the district court's unchallenged factfinding to "consider additional salient facts that were elicited, and uncontroverted," as well as facts not considered by the district court, App:57;

- conclusively and independently decide, as "an issue of law," "the importance of facts in light of the §3553(a) factors," App:57; and

- decide for itself, rather than review for reasonableness, whether the district court's justification is "sufficiently compelling," App:50, 72.

Armed with this new standard, the Eleventh Circuit reweighed the factors under §3553(a), concluded that the district court's justifications were "insufficiently compelling to support any variance," App:72, and ruled that one factor alone – the need for the sentence imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment" under §3553(a)(2)(A) – had dispositive weight in this case. App:129-30.

Tellingly, none of the cases relied on by the Eleventh Circuit applies the abuse-of-discretion standard described in *Pierce*, *Cooter & Gell*, or *Koon*, adopted in *Booker*, and emphasized in *Gall*. In fact, the standard used here is much the same as the standard adopted by the Eighth Circuit after *Booker* and applied by that court in *Gall*, which was reversed by this Court.

First, the Eleventh Circuit cited *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir.2006) (*en banc*), decided before *Gall* and not involving a sentencing appeal, for the assertion that "[a] district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." App:55. Next, it stated that under the third prong of this standard, "a district court commits a clear error of judgment when it considers the proper factors *but balances them unreasonably*," App:55 (emphasis added), citing a 2005 civil case, *Ameritas Variable Life*

Ins. Co. v. Roach, 411 F.3d 1328, 1330 (11th Cir.2005) (per curiam), in which it considered a district court's decision not to exercise jurisdiction over an action for declaratory judgment.

The standard applied in both *Ameritas* and *Campa* was derived from the standard applied by the Eighth Circuit in *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970-71 (8th Cir.1984), a civil case in which it reviewed a district court's decision to dismiss an action without prejudice under Fed.R.Civ.P. 41. *See Ameritas*, 411 F.3d at 1330; *Campa*, 459 F.3d at 1174. In *Kern*, the Eighth Circuit stated, without citation, that an abuse of discretion occurs "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." 738 F.3d at 970.

In *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.2005), the Eighth Circuit applied the *Kern* standard in a post-*Booker* sentencing appeal. In *Gall*, the Eighth Circuit applied the *Haack / Kern* standard to rule that the district court "did not properly weigh" the seriousness of the offense in light of the guidelines' punishment for the quantity of drugs, gave "too much weight" to the defendant's voluntary withdrawal from the conspiracy and his post-offense rehabilitation, gave "significant weight" to "an improper factor" relating to age, and failed to consider "unwarranted disparities" as compared to defendants convicted of the same offense sentenced to the guideline range, finally

determining that the sentence of probation, not permitted under the guidelines, was "outside the limited range of choice dictated by the facts of the case." *Gall*, 446 F.3d at 889-90. In reversing the district court's variance to probation, the Eighth Circuit focused on one purpose of sentencing – the need for retribution as measured by the guidelines – and rejected all mitigating offense and offender characteristics that the district court had found were relevant to the need for deterrence, incapacitation, and rehabilitation. *Id.* And it limited the district court's "range of choice" by ordering the district court to impose a sentence of imprisonment. This Court rejected each of those determinations and observed that the Eighth Circuit's standard of review "more closely resembled *de novo* review" than abuse-of-discretion review. *Gall*, 552 U.S. at 56-60.

Having loosely paraphrased an abuse-of-discretion standard from an unrelated context (the same standard that led to this Court's reversal in *Gall*), the Eleventh Circuit next asserted that the "principle that discretion can be abused by unreasonably balancing proper factors is solidly established in Supreme Court precedent," App:56, *citing Piper Aircraft v. Reyno*, 454 U.S. 235, 257 (1981). But *Piper Aircraft* concerned whether the district court abused its discretion by dismissing a civil action on the ground of *forum non conveniens* based on factors derived from case law and under a balancing test that *expressly* weighs the relative convenience of the parties. *Id.* at 241. And this Court *reversed* the appellate court's decision there because it accorded one factor conclusive weight, *id.* at 247, which is precisely

what the Eleventh Circuit did here by according dispositive weight to the seriousness of the offense.

The Eleventh Circuit next stated, without support, that "the importance of facts in light of the §3553(a) factors is not itself a question of fact, but instead is an issue of law," suggesting that as such, it receives more "substantive scrutiny." App:57. For this, the court cited *United States v. Taylor*, 487 U.S. 326 (1988), which involved the dismissal of a case with prejudice under the Speedy Trial Act. But *Taylor* says no such thing. It stands for the simple proposition that when Congress has listed specific factors for the court to consider, courts are not "free simply to exercise their equitable powers in fashioning an appropriate remedy, but, in order to proceed under the Act, must consider at least the three specified factors." *Id.* at 333. This Court reversed because the court "failed to consider all the factors" and "what factors it did rely on were unsupported by factual findings or evidence in the record," *id.* at 344. Nowhere does *Taylor* suggest that the appellate court may independently and conclusively *reassign* weight to the statutory factors at issue that were considered by the district court based on unchallenged findings of fact, or to consider additional findings based on evidence not presented to the district court.

Finally, the Eleventh Circuit announced the following standard for reviewing whether a sentence is substantively unreasonable: "In the context of sentencing, the proper factors are set out in 18 U.S.C. §3553(a), and a district court commits a clear error in judgment when it weighs those factors unreasonably,

arriving at a sentence that does not achieve the purposes of sentencing as stated in §3553(a)." App:56 (internal quotation marks omitted). For this, it cited *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008), in which it applied a similar standard also derived from the standard used by the Eighth Circuit in *Gall*. *See id.* (citing cases derived from *Kern*). The Eleventh Circuit concluded by stating that it was "required to make the sentencing calculus" itself. App:56. Applying this standard, the Eleventh Circuit resentenced Irey to 30 years' imprisonment.

Other courts of appeals recognize that review for abuse of discretion does not permit independent and conclusive recalculation of the proper weight to accord facts in order to bind the district court to a particular sentence on remand. *See Cavera*, 550 F.3d at 191 ("[W]e do not consider what weight we would ourselves have given a particular factor."); *United States v. Smart*, 518 F.3d 800, 807-08 (10th Cir.2008) ("[I]t is not enough to solely credit raw findings of individual fact"; appellate courts must "defer also to [the district court's] determinations of the weight to be afforded to such findings.").[2] Further, the Eleventh Circuit is mistaken that the "importance of facts in light of the §3553(a) standard" is an "issue of law" requiring a heightened standard of review. Regardless of whether

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[2] *See United States v. Zapata*, 589 F.3d 475, 488 (1st Cir.2009); *United States v. Tomko*, 562 F.3d 558, 574 (3d Cir. 2009)(*en banc*); *United States v. Douglas*, 569 F.3d 523, 526 (5th Cir.2009); *United States v. Munoz-Nava*, 524 F.3d 1137, 1148 (10th Cir.2008); *see also* App:242 (Edmondson, Birch, Barkett, Martin, J.J., dissenting).

it is characterized as an issue of law or fact, the deference owed to the district court's judgment regarding the fact-dependent determination of the appropriate weight to accord the §3553(a) factors is the *same* under the abuse-of-discretion standard adopted by this Court in *Booker*.[3] *See* Part B.1, *supra*. Allowing appellate courts to reweigh the §3553(a) factors would effectively resurrect the now-excised §3742(e).

C. The Eleventh Circuit misapplied the standard for "departures" to the district court's consideration of the defendant's history and characteristics, in conflict with *Gall* and with every other circuit.

As part of its justification for conclusively resentencing Mr. Irey to a guideline sentence, the Eleventh Circuit said that for the defendant's mental disorder to qualify as a ground for variance, it must distinguish the defendant from other defendants who commit the same crime, and "take the present case outside the heartland of cases covered by the individual guideline." App:84-85. Regarding age, it required that the defendant be "different from any other person" who commits a similar crime at a similar

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[3] *Tomko*, 562 F.3d at 565 ("[C]ourts of appeals apply the abuse-of-discretion standard to fact-bound issues that are ill-suited for appellate rule-making."); *see also United States v. Martin*, 520 F.3d 87, 92 (1st Cir.2008) ("A corollary of the broad discretion that *Gall* reposes in the district courts is the respectful deference that appellate courts must accord district courts' fact-intensive sentencing decisions.").

age. App:92. Pointing to the Sentencing Commission's restrictive policy statements regarding downward "departures" based on age (USSG §5H1.1), "civic, charitable, or public service . . . and similar prior good works" (USSG §5H1.11), and mental condition (USSG §5H1.3), and while acknowledging that they are "not binding on the district court," the court noted that they "advise against a sentence below the guidelines range[,]" and concluded that because the district court relied on those factors to support a downward variance, the district court "effectively ignored" those policy statements. App:121-123.

This "heartland" analysis is the standard for "departures" based on mitigating factors deemed "not ordinarily relevant" by the Sentencing Commission and requiring that a mitigating characteristic be present to an "unusual" or "exceptional" degree. *See* USSG §5K2.0(a)(4); USSG Ch. 1, Pt. A, intro. comment. (4)(b); *see also United States v. Rivera*, 994 F.2d 942, 947-48 (1st Cir.1993) (Breyer, C.J.); *Irizarry v. United States*, 553 U.S. 708, 714 (2008) ("'Departure' . . . refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.").[4] This standard does not apply to the

[4] In November 2010, the Commission amended the policy statements applying to age and mental condition to say that these factors "may be relevant" to "departure," but only if they are "present to an unusual degree and distinguish the case from the typical cases covered by the guidelines." *See* USSG §5H1.1, 5H1.3. This is the same standard prescribed before 2003 for mitigating factors deemed "not ordinarily relevant," except that it replaces the word "heartland" with the word "typical." *See* USSG §5K2.0 (2002).

determination of the appropriate sentence under §3553(a), which requires the district court to consider the history and characteristics of the defendant in determining the sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing set forth in §3553(a)(2), regardless of whether the Commission has prohibited, discouraged, or limited consideration of such factors for "departure." *See* 18 U.S.C. §§3553(a)(1), 3661. As a result, a district court is free, in considering mitigating factors for purposes of reaching the appropriate sentence under §3553(a)(1)&(2), to disregard the restrictions in departure policy statements when neither party asks for a "departure." *Rita*, 551 U.S. at 351 (judges consider arguments raised by the parties); *id.* at 357 (same).

This principle was demonstrated in *Gall*, when this Court upheld a non-guideline sentence based on factors that the guidelines' policy statements prohibit, *i.e.*, voluntary withdrawal from a conspiracy,[5] or deem "not ordinarily relevant," *i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs.[6] 552 U.S. at 51-60. In approving the judge's reliance on these factors, this Court made no mention of these policy statements.

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[5] While voluntary withdrawal from a conspiracy is a factor that may be considered in determining whether to grant a two-level reduction for acceptance of responsibility, *see* USSG §3E1.1, comment. (n.1(b)), acceptance of responsibility is a prohibited ground for departure. *See* USSG §5K2.0(d)(2).

[6] *See* USSG §§5H1.1, 5H1.2, 5H1.4, 5H1.5.

Moreover, this Court "reject[ed] an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range." *Id.* at 46.

Requiring district courts to find a distinction from the "typical" defendant is to require them to misapply §3553(a). The district court's duty under §3553(a) is to consider how the particular defendant's characteristics relate to the purposes of sentencing, not to determine whether the defendant is atypical. Moreover, requiring atypicality pre-supposes that the guidelines take into account regularly occurring mitigating characteristics and circumstances, when in fact they do not.[7] In this sense, requiring courts to find that a defendant is atypical as compared to others who commit the same crime promotes unwarranted uniformity, contrary to §3553(a). It also conflicts with the approach of other circuits, which hold that there is no requirement of "unusualness" before a factor may be considered under §3553(a) when determining what sentence is sufficient but not greater than necessary to serve the purposes of sentencing. *See Smart*, 518 F.3d at 808; *Martin*, 520 F.3d at 95 (1st Cir.2008); *Tomko*, 562 F.3d at 571(3d Cir.2009)(*en banc*); *United States v. Howe*, 543 F.3d 128, 138 (3d Cir.2008); *United States v. Simmons*, 568 F.3d 564, 568 (5th Cir.2009); *United States v. Davis*, 537 F.3d 611, 616-17 (6th Cir.2008); *United States v. Chase*, 560 F.3d 828, 832 (8th Cir.2009).

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[7] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17Hofstra L. Rev. 1, 18-20 (1988).

As the Tenth Circuit explained, "[a]llowing sentencing variances only on the existence of extraordinary defendant 'characteristics and history' assumes not that the Guidelines give a 'rough approximation' of appropriate sentences, but that they dictate the *only* appropriate sentence in the absence of extraordinary facts." *Smart*, 518 F.3d at 808. Just like reweighing the §3553(a) factors, *see* Part B.3, *supra*, reviewing variances under the standard for departures effectively resurrects the now-excised §3742(e)(3)(B), under which appellate courts reviewed *de novo* whether a departure was authorized under §3553(b), which permitted departure only when authorized by the guidelines.

D. The Eleventh Circuit misapplied "closer review" to the district court's consideration of a mitigating factor.

In *Kimbrough*, this Court made clear that a district court may vary from the advisory guideline range in "a mine-run case" based on its finding, supported by evidence, that the guideline range is not the product of the Sentencing Commission's "characteristic institutional role," fails to "take account of empirical data and national experience," and is, "in the District Court's judgment," "greater than necessary to accomplish the purposes of sentencing set forth in 18 U.S.C. §3553(a)." *Kimbrough*, 552 U.S. at 92-93, 109. At the time, the Court suggested that "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect §3553(a) considerations' even in a mine-run

case." *Id.* at 109. But because the guidelines for crack cocaine considered there "do not exemplify the Commission's exercise of its characteristic institutional role," the Court declined to further discuss the matter. *Id.* Thus, the Court has never held that "closer review" is required in any case. The Eleventh Circuit, however, applied "closer review" here, even though the district court never expressed a "view" that could potentially trigger that review.

Here, the district court found that the defendant's acts "were not purely volitional," "due in substantial part to a recognized illness" – pedophilia – and credited the opinions of mental health experts that he "is treatable," was in fact successfully pursuing treatment, and would have a low risk of recidivism when released. App:315. The district court found these facts to be mitigating "personal factors" indicating that a shorter sentence would be sufficient to serve the purposes of sentencing, including the needs "to promote respect for the law," for "just punishment," and "to protect the public from further crimes of the defendant." App:316-17; *see* 18 U.S.C. §3553(a)(2)(A), (C).

Citing a report not presented to the district court, the Eleventh Circuit found that "most sexual abuse of children" is done by pedophiles. App:84-85. As a result, the Eleventh Circuit concluded, the district court's consideration of the non-volitional nature of pedophilia as a mitigating factor "is more properly seen" as a categorical policy disagreement with the guideline range for child sex abuse, requiring "closer review." App:86. Having thus recharacterized

the district court's consideration of that factor from an aspect of its individualized assessment of the particular offense and offender under §3553(a) into a categorical rejection of the guideline, the Eleventh Circuit summarily exercised "closer review" and "reject[ed] as unreasonable and a clear error in judgment" the district court's "view." App:86. It said the reasons are "apparent," but also pointed to its later discussion regarding harm to victims. App:86.

The Eleventh Circuit misunderstood and misapplied *Kimbrough*. The district court did not express any "view" regarding a guideline as a matter of policy. Yet, the Eleventh Circuit would apply "closer review" whenever a district court relies a mitigating characteristic that occurs in what it finds to be a large number of cases, even though the district court *in that case*, and as part of its individualized assessment of the offense and the offender under §3553(a), found the factor to be relevant in reaching a sentence "sufficient, but not greater than necessary" to serve the purposes of sentencing under §3553(a). To call this a "view" that the guideline represents unsound policy turns a district court's individualized assessment on its head. Further, it is entirely reasonable for a district court to consider a defendant's mental disorder as mitigating culpability and lessening the need for punishment, even when the harm is great. *See* Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 73 (2005).

E. By engaging in independent factfinding based on evidence and arguments not presented to the district court, the Eleventh Circuit deprived the defendant of adversarial testing before the trier of fact.

Despite repeatedly noting that the government "insisted" it was not challenging the district court's factfinding, the Eleventh Circuit reexamined all the facts and evidence, considering, in the process, evidence not presented to the district court, in order to conclude that the district court's determinations regarding the importance of facts in light of the §3553(a) factors were not supported by the record.

For example, the Eleventh Circuit disputed the district court's finding, unchallenged by the government, that the acts of a pedophile are not "purely volitional" "due in substantial part to a recognized illness," relying on an article not presented to the district court. App:84-86. It disputed the district court's finding that Irey was a good father, husband, and member of the community, dismissing the testimony of character witnesses as not deserving any credit against "the weight stacked against him for the criminal acts he committed" and finding as a fact that "[n]o one who commits such heinous crimes has good character[.]" App:88,91-92. It disputed the district court's skepticism, unchallenged by the government, that a longer sentence in this case would promote general deterrence. App:103-04. To justify exercising "closer review," *see* Part D, *supra*, it relied on an article, again not presented to the district court, to find that most sexual abuse of children is done by

pedophiles.

Regarding Irey's risk of recidivism, the court relied on selected data, likewise not presented to the district court, to find "pedophiles who have sexually abused children are a threat to continue doing so, and age does not remove the threat[;]" nor does supervised release. App:111-16. Though it nevertheless "assumed" the district court's finding that Irey would present a low risk of reoffending, the court found that a low risk was too great, and thus the sentence imposed "does not afford adequate protection from further crimes by him." App:116-18.

In doing so, the Eleventh Circuit went far beyond what an appellate court may do even when engaging in actual substantive scrutiny. *Cf. Bose v. Consumers Union*, 466 U.S. 485, 492&n.8 (1984) (even under "independent review of the entire record," where party did not contest a finding of the district court, an appellate court "of course, do[es] not pass on that question"). Moreover, had the government presented the district court with the studies cited by the Eleventh Circuit regarding recidivism and child sex offenders, Irey could have presented evidence, some from the same studies, showing that the vast majority of sex offenders do not reoffend, *see* U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* 24 (2003); that sex offense recidivism declines with age, and that only a very few child sex offenders released after age 60 recidivate, *see* R.K. Hanson, *Recidivism and Age: Follow-up Data from 4,673 Sexual Offenders*, 17 J. Interpers. Violence 1046, 1054 (2002); that cognitive

behavioral therapy, which Irey was successfully undergoing, substantially reduces recidivism, U.S. Dep't of Justice, Center for Sex Offender Management, *Understanding Treatment for Adults and Juveniles Who Have Committed Sex Offenses* 10 (2006), all of which supports the actual testimony *in this case*, based on expert assessments, regarding Irey's particular risk of recidivism.

Similarly, had the government argued that the sentence imposed would not serve the need for general deterrence, Irey could have presented empirical evidence that longer sentences do not in fact decrease the likelihood that others will commit crimes or increase public safety, but can actually increase recidivism. *See, e.g.*, Valerie Wright, PhD, The Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* 6-7 (2010) (collecting and briefing studies).

By deciding for itself the import of selected data not presented to the district court, the appellate court deprived Irey of his right to the "thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 551 U.S. at 351; *Burns v. United States*, 501 U.S. 129 (1991). As stated by Judge Tjoflat in his concurring and dissenting opinion below:

> After today's opinion, it is the law of this circuit that a party who is disappointed by the sentence the district court has imposed may apply to this court for resentencing. Except for live testimony, the disappointed party can brief evidence

> never offered and arguments never articulated to the district court. From its new vantage point, this court will then second-guess the district court's sentence. We will determine the range of objectively correct sentences based on the new facts and new arguments; if the sentence handed down by the district court falls outside of that range, we will reverse.

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For all these reasons, Mr. Irey prays that this Court will grant certiorari review to make clear that a court of appeals may not, under review for abuse of discretion, independently and conclusively reassign the weight to be accorded a factor under §3553(a) in order to order the district court to impose a 30-year guideline sentence on remand.

II.

The Eleventh Circuit exceeded its authority by delaying the issuance of the mandate without providing the parties with notice of its intention to do so and abused its discretion by failing to take any action for more than four months after the court issued its original panel decision.

The Eleventh Circuit exceeded its authority by failing to timely issue its mandate, because the court failed to provide the parties with notice of any kind, and its action directly contravened the plain language of Fed.R.App.P. 41(b). Even if the Eleventh Circuit had the authority to delay the issuance of the mandate without taking any action or providing notice to the parties, the court's failure to take any action for more than four months after it issued its panel decision exceeded that authority.

Rule 41(b) provides the following:

> The court's mandate *must* issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

Fed.R.App.P. 41 (emphasis added).

In *Bell v. Thompson*, 545 U.S. 794 (2005), this Court stated:

> *It is an open question whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction.* Even assuming however, that a court could effect a stay for a short period of time by withholding the mandate, a delay of five months is different in kind. Basic to the operation of the judicial system is the principle that a court speaks through its judgments and order. Without a formal docket entry neither the parties nor this Court had, or have, any way to know whether the court had stayed the mandate or simply made a clerical mistake.

Id. at 805 (emphasis added) (internal quotations and citations omitted).

In *Thompson*, a divided panel of the Ninth Circuit affirmed the federal district court's denial of the defendant's federal habeas petition. The circuit court stayed the issuance of its mandate pending the disposition of the defendant's petition for writ of certiorari in this Court. *Thompson*, 545 U.S. at 796-800. After this Court denied the certiorari petition, the appellate court extended the stay of its mandate pending disposition of the defendant's petition for rehearing. Five months after this Court denied rehearing, the circuit court, *sua sponte*, issued an amended opinion in the defendant's federal habeas

appeal, vacating the district court's decision. This Court granted the state's petition for writ of certiorari to decide "the scope of the Court of Appeals' authority to withhold the mandate pursuant to Federal Rule of Appellate Procedure 41." *Id.* at 800-01.

This Court held that the circuit court abused its discretion, citing as a prominent reason the five-month delay between its denial of certiorari and the circuit court's issuance of its amended opinion. This Court found that the parties' assumption that the proceedings had come to a conclusion was reasonable because the circuit court's amended opinion did not issue until after this Court had denied certiorari. This Court reasoned that, as a practical matter, its denial of discretionary review usually signals the end of litigation. *Id.* at 801-05.

"While Rule 41(b) may authorize a court to stay the mandate after certiorari is denied, the circumstances where such a stay would be warranted are rare." *Id.* at 806. "By providing a mechanism for correcting errors in the courts of appeals before Supreme Court review is requested, the Federal Rules of Appellate Procedure ensure that litigation following the denial of certiorari will be infrequent." *Id.*

In reversing the circuit court, this Court held that the court abused any discretion it was arguably afforded by Rule 41 when it stayed the issuance of its mandate without entering a formal order after the Court had already denied certiorari. *Id.* at 813-14.

The facts of Irey's case present this Court with the opportunity to clarify the bounds of a circuit court's authority under Rule 41(b) and answer the question left open in *Thompson* whether a circuit court can extend the time for issuance of its mandate by simply taking no action. *Id.* at 805.

This Court has also held that "[t]he promptness in which a court acts to correct its mistakes is evidence of the adequacy of its grounds for reopening the case." *Calderon v. Thompson*, 523 U.S. 538, 552 (1998); *see also Patterson v. Haskins*, 470 F.3d 645, 663-64 (6th Cir.2006). Here, the significant and unexplained delay of more than four months that ensued before the Eleventh Circuit *sua sponte* granted rehearing *en banc* suggests that there were no adequate grounds for doing so. More significantly, although Rule 41(b) indicates that a court may shorten or extend the time for issuing its mandate, there is nothing in the rule that suggests that a court may do so without taking some sort of formal action. It is well established that a court speaks through its judgments and orders. *Bell v, Thompson*, 545 U.S. at 805.

Here, no notice of any kind was provided to the parties that the Eleventh Circuit was withholding its mandate. No order was issued; no docket entry was made reflecting that the Court had made a conscious decision to withhold the issuance of its mandate; and there was no formal indication that the Circuit Court actually notified the Clerk to withhold the issuance of its mandate prior to the date the mandate was required to be issued.

The Eleventh Circuit appears to have recognized that the procedures it employed in Irey's case were problematic. On August 1, 2010, two days after rendering its *en banc* decision, the Eleventh Circuit revised its Internal Operating Procedures to require that the parties be notified via a formal docket entry and PACER if the mandate will not be issued on the ordinary date. App:324-25.

Even if the Eleventh Circuit had the authority to temporarily delay the issuance of its mandate without providing notice to the parties, the delay of more than four months that occurred in this case before the court granted rehearing *en banc* constituted an abuse of discretion similar to the one committed by the circuit court in *Bell v. Thompson*. The Eleventh Circuit issued its panel decision on March 30, 2009. The government had until April 20, 2009 to petition for rehearing, and until June 29, 2009 to petition for a writ of certiorari. Because no petition for rehearing was filed, Rule 41 required the court to issue the mandate by April 27, 2009. The Eleventh Circuit, however, did not issue its order granting rehearing *en banc* until August 12, 2009, more than a month after the time for the government to seek review in this Court had expired. Like the parties in *Bell v. Thompson*, it was reasonable for the parties in the instant case to believe that the proceedings in this matter had concluded once the deadline for the government to seek review in this Court had expired.

The Eleventh Circuit thus exceeded its authority and abused any discretion it may have under Rule 41, thereby warranting certiorari review to clarify

the extent of a circuit court's authority under Rule 41.

CONCLUSION

Based on the violations of this Court's teachings, the important federal questions involved, and conflict with other circuits, Petitioner respectfully requests certiorari review of the Eleventh Circuit's *en banc* decision herein.

Respectfully submitted,

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November 24, 2010

No. _____

In The Supreme Court of the United States

WILLIAM IREY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10997

D. C. Docket No. 06-00237-CR-ORL-31-DAB

UNITED STATES OF AMERICA, Plaintiff-Appellant,

versus

WILLIAM IREY, Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

(July 29, 2010)

Before DUBINA, Chief Judge, and TJOFLAT, EDMONDSON, BIRCH, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON, PRYOR, MARTIN and HILL,* Circuit Judges.

* Senior United States Circuit Judge James C. Hill elected to participate in this matter pursuant to 28 U.S.C. § 46(c).

CARNES, Circuit Judge:

"The federal courts of appeals review federal sentences and set aside those they find 'unreasonable.'" Rita v. United States, 551 U.S. 338, 341, 127 S. Ct. 2456, 2459 (2007) (citing United States v. Booker, 543 U.S. 220, 261–63, 125 S. Ct. 738 (2005)). With that statement the Supreme Court opened its opinion in the Rita case. Later in the opinion the Court was more specific and emphatic:

> In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur. Our decision in Booker recognized as much.

Rita, 551 U.S. at 354, 127 S. Ct. at 2466–67. We believe that the Supreme Court meant what it said in the Rita opinion and elsewhere about our duty to correct sentencing mistakes. At the same time, we recognize that our substantive review of sentences is deferential and that we only look to see if the district court abused its discretion by committing a clear error in judgment. Even so, the sentence in this case can withstand review only if deference amounts to abdication, if sentencing discretion is unbridled, and if "unreasonable" is a hollow term. The sentence that the district court imposed is a clear error in judgment, a mistake, and it is our responsibility to "correct such mistakes when they occur."

The sentence is substantively unreasonable primarily, but not solely, because of the nature and

extent of William Irey's criminal conduct. The steady stream of criminal cases flowing through this court brings us many examples of man's inhumanity to man, and we see a depressingly large number of crimes against children. But the sexual crimes that Irey committed against some of the most vulnerable children in the world set him apart. He raped, sodomized, and sexually tortured fifty or more little girls, some as young as four years of age, on many occasions over a four-or five-year period. He also scripted, cast, starred in, produced, and distributed worldwide some of the most graphic and disturbing child pornography that has ever turned up on the internet.

The horrific nature of Irey's crimes resulted in an adjusted offense level that would have led to an advisory guidelines range of life imprisonment. Because the government had charged all of Irey's crimes in just one count, the statutory maximum was 30 years and that had the effect of reducing the guidelines range to 30 years as well. The district court, however, did not impose that sentence. Instead, after deciding that pedophilia was an "illness" that had impaired Irey's volition, and pronouncing that Irey himself was a victim, like all of the little children he had sexually violated for so long, the district court deviated downward from the 30-year guidelines range and imposed a sentence of only 17½ years. Our duty to set aside unreasonable sentences requires that we set aside this one.

I. The Criminal Conduct

William Irey had a seemingly insatiable sexual appetite. Or as a psychiatrist he later

retained would phrase it, Irey was "highly sexualized." While in Orlando, where he lived and had his business, Irey indulged his sexual appetite by consorting with prostitutes on a weekly basis. As the psychiatrist put it, Irey "engaged in other forms of sexually disordered behavior with prostitutes (e.g., sadomasochistic acts)." That went on for 15 years, despite the fact that he was married the entire time.

Starting in 2001 Irey began spending two weeks out of every month in China on business. On the weekends when he was there he would indulge himself in more "sexually disordered behavior" by traveling to brothels in different Asian countries. Early on he went to a brothel in Cambodia that featured underage girls and discovered that he enjoyed having sex with children. Over a period of four or five years, he "visited numerous brothels where they had underage children." Irey, who is 5'10" and weighs 200 pounds, was in his forties at the time. All of the children he sexually abused were underage girls; none of them was older than sixteen, and some of them were only four, five, or six years old.

Irey went to those brothels and had sex with the children "many many times," as he recounted it, during his numerous trips to that part of the world, and as time went on he became "more and more obsessed and was returning to Asia more and more often" to sexually abuse children. He paid the Cambodian brothels up to $1,500 for the use of each child, and he would typically buy two or three of the children at a time. When he was too busy in China on business to get away for weekend visits to Cambodia, Irey would sometimes pay to have some of the young girls flown to him so that he could

sexually abuse them when he found the time. Irey's sexual violation of the children did not end until August of 2006 when law enforcement in this country finally caught up with him.

The little Cambodian children whom Irey victimized were "abjectly impoverished" and, as the district court noted, "perhaps the most vulnerable of the world's society." We know some of the details of what Irey did to them because law enforcement agents seized his computers and found that he had memorialized at least part of what he had done in photographs and videos for his later viewing pleasure. On one of his computer hard drives there were more than 1,200 images of Irey sexually abusing the children, and that number does not include the obscene images Irey produced of the children that do not show him in the picture. Differentiating the children in so many images taken over a period of years is difficult, but we know that Irey sexually victimized at least fifty different underage girls.[1]

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[1] The number of little children who were Irey's victims is literally countless. Irey himself apparently did not keep count, although he did recall that he bought children to sexually abuse "many many times," usually two or three at a time, over a four- or five-year period. Some of the more than 1,200 obscene images Irey produced to preserve his perverse exploits show the faces of many children, but the images were not framed and focused to aid a head count, and with the passage of years the appearances of the children undoubtedly changed as they grew older while being sexually abused.

The Presentence Report states that "[t]here were over forty victims," and Irey did not object to that statement but instead admitted it was true. During the sentencing hearing Assistant United States Attorney Cynthia Hawkins,

The photographs and videos Irey produced reveal some details of how he violated and debased the children.[2] There are images showing "Irey on a bed with several prepubescent female Asian children performing oral sex on him while he performs oral sex on them." Other images depict "Irey engaged in anal and vaginal intercourse with a prepubescent Asian female with the words '9 Yo Fuck' marked on her body," and "an arrow is painted on her body which points to her vaginal area." Some of them show "the writing 'Front,' 'Back,' 'Brown,' 'Back door,' '9 Yo Fuck' on prepubescent girls' bodies. The writing has arrows pointing to the vaginal and anal

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who prosecuted the case, described Irey's criminal conduct. In doing so she represented to the court that the number of his child victims was "over 50." She also showed the court photographs of the faces of "about 50" of the child victims taken from the more than 1,200 images of Irey abusing them. Irey did not object to those photographs or to the representation that they showed about 50 of his victims or that there were "over 50" victims. In setting out its sentence findings, the district court stated about the circumstances of the crime: "I cannot quarrel with Ms. Hawkins' description of that." Based on that finding, and considering the AUSA's undisputed representations at the sentence hearing, as well as the probability of an undercount, we will use 50 or "at least 50" as the number of victims.

[2] All of the descriptions of Irey's conduct contained in this and the next paragraph in the text are quoted from the Presentence Report. Irey did not contest the accuracy of these descriptions. Instead, he wrote to the district court that: "I have read the presentence investigation report dated 11-26-07. I have done the things which are graphically spelled out in it." The district court adopted all of the factual statements contained in the report as the findings of the court.

areas." Other images are of Irey "engaged in vaginal and anal intercourse with prepubescent Asian girls" who are "tied up and bound with black and grey duct tape." There are also images "of Irey with nude prepubescent children posing as trophies."

Irey's defilement of the little children did not stop at rape, sodomy, and humiliation. He also tortured them. There are images of "Irey inserting a plastic green/yellow glow stick, dildos, cockroaches and candy in the vaginal cavity of prepubescent Asian females." Some images show "Irey inserting a plastic tube into the vagina of a prepubescent Asian female. Several of the images show the plastic tube containing cockroaches crawling into the vagina of these children." One image shows him "performing vaginal intercourse on a prepubescent girl" and "[i]mbedded on the image [in all capitals] is the phrase: 'Big Cock Push Bug Deep Into 9 Yo Girl, She Hurt in Pane.'"

If Irey felt any guilt about purchasing helpless little girls and subjecting them to pain and degradation, the images he recorded do not show it. In some of them he can actually be seen smiling as he inflicts the sexual abuse.

Irey did not use the massive amount of child pornography he produced only for his own prurient perusal; he did not keep it to himself. He used copies of the images he made to gain access to the collections of other purveyors of child pornography. Irey gave them copies of the pictures and videos he had produced showing his sexual violation and humiliation of the little Cambodian children in return for their waiver of the access fee to the collections they already had on their websites. Through that type of trade the operators of those

websites were able to add Irey's graphic images to their collections, which led to those images being spread around the world. Irey in turn was able to save some money while expanding his collection of child pornography, and he was also able to minimize the use of his credit card, which made it easier for him to hide what he was doing from his wife.

II. The Capture and Conviction

Irey's use of the internet led to his capture. Federal agents intercepted and traced to Irey email messages that he had sent to an illegal website offering child pornography. In one of those emails, which Irey sent in mid-January 2006, he asked the website operator: "do you remember me from before. could I trade you some of my latest pics for 30 days on your site. Let me know a good address to send you some samples." About a month later, agents intercepted another email from Irey, which stated: "do you want trade some new pics never saw before. I trade this for site access."

The agent's searched Irey's house on August 13, 2006, and seized six computers. On a hard drive they found a collection of more than 1,200 images of Irey sexually violating young girls. The agents sent those 1,200 plus images to the National Center for Missing and Exploited Children, which in turn provided an extensive report about where the images had been seen before. More than 100 separate law enforcement agencies reported to the National Center that they had previously turned up some of those images of Irey's sexual abuse of underage girls in their investigations of child pornography. The graphic images Irey had produced and distributed

were already widely known as the infamous "pink wall series," so named because of the pink walls that could be seen in the background of some of the photos and videos. The series included images of some of the worst child sexual abuse the agents had ever seen. And, as the Assistant United States Attorney pointed out at the sentence hearing: the pictures of these children, some of whom are "four or five, six years old . . . will forever be out there online." As the record of their abuse continues to circulate, "[t]hey will be victimized over and over again."

In a one-count indictment filed on December 13, 2006, Irey was charged with violating 18 U.S.C. § 2251(c). The indictment alleged that he "did knowingly employ, use, persuade, induce, entice, and coerce minors to engage in sexually explicit conduct outside the United States, for the purpose of producing visual depictions of such conduct, and transporting such visual depictions to the United States by any means, including by computer and mail."

Irey was taken into custody on December 14, 2006. He was released on an unsecured bond conditioned on his being housed in a psychiatric facility "for treatment of mental health issues related to the current charges." He remained at that facility near his home for at least thirteen months.

At a change of plea hearing on July 2, 2007, Irey pleaded guilty to one count of violating 18 U.S.C. § 2251(c). When asked to tell the court what he had done, Irey replied: "Went to—overseas, visited numerous brothels where they had underage children and photographed them, had sex with them, and had them on my laptop when I entered the

United States." He added that it happened over a period of four years,[3] the last time being in 2006. Irey agreed with the government's statement at the hearing that he had admitted to the agents that while overseas he had sex with children he knew were minors, had produced pornographic images of that, and had then transported those images back into this country.

III. The Sentencing Proceedings and Sentence

A. The Calculation of the Guidelines Range

The Presentence Report began the calculation of Irey's guidelines sentencing range with a base offense level of 32 under U.S.S.G. § 2G2.1(a), because the offense was one involving the sexual exploitation of minors by production of sexually explicit visual or printed matter. Added to that base offense level were four levels under § 2G2.1(b)(1) because the offense involved children under the age of 12; two levels under § 2G2.1(b)(2)(A) because the offense involved the actual commission of sexual acts; two levels under § 2G2.1(b)(3) for distribution of child pornography; and four levels under § 2G2.1(b)(4) because it involved material portraying sadistic conduct, producing an adjusted offense level "subtotal" of 44. Then two levels were added under § 3D1.4 as a result of grouping because of multiple

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[3] Although Irey stated at the change of plea hearing that his sexual abuse of the children occurred over a period of four years, he told Dr. Ted Shaw that it occurred over a period of five years.

victims.[4] Those additions produced a combined adjusted offense level of 46.[5] From that were deducted two levels under § 3E1.1(a) for acceptance of responsibility and an additional level under § 3E1.1(b) for timely notification of intent to plead guilty. Subtracting those three levels from the 46 produced a final offense level of 43.

Because Irey had no prior convictions his criminal history category was I. Even with that category an offense level of 43 produces an advisory guidelines imprisonment range of life. The statute under which he was convicted, however, carries a statutory maximum of 30 years. See 18 U.S.C. §

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[4] Although only one count was charged in the indictment, the guidelines consider each separate victim as a separate "group" for purposes of offense-level calculation. U.S.S.G. § 2G2.1(d)(1). In this case, the PSR did not proceed beyond two groups because two were enough to put the defendant's combined adjusted offense level at 46 and his final offense level at 43, which is the maximum level available under the guidelines. Had the PSR considered all fifty children, five levels would have been added rather than two (the grouping ceiling is fixed at 5 levels regardless of the number of offenses), which would have given Irey a combined adjusted offense level of 49 and a final offense level of 46.

[5] The Presentence Report pointed out that under § 2G2.1 cmt. n.6, "[a]n upward departure may be warranted because the offense involved more than ten minors." No upward departure was requested by the government or applied by the district court, probably because it would not have made any difference since the adjusted offense level and criminal history score worked out to a guidelines imprisonment range of life even without an upward departure.

2251(c). As a result, the guidelines "range" became 360 months (30 years); there was no spread—the top and bottom of the range were the same. See U.S.S.G. § 5G1.1(a) ("Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.").

Neither party objected to the calculation of the guidelines range. In his sentencing memorandum, Irey's counsel stated: "Mr. Irey does not object to the Probation Officer's advisory guideline calculations and does not seek a downward departure from the guideline range described in the PSR." Irey did, however, ask for a sentence below the guidelines range of 30 years. The statute requires a minimum sentence of 15 years. See 18 U.S.C. § 2251(c). Irey's sentencing memorandum argued that "[a] sentence of 15-20 years in prison, followed by a substantial term of supervised release" should be imposed.

The government filed a sentencing memorandum arguing that "[i]f this case is atypical, it is because of aggravating, not mitigating, factors," and it urged the court to impose a sentence equal to the guidelines range and statutory maximum of 30 years. The government told the court that it "should give great weight to the findings of Congress . . . that departures should be extremely rare in child sex crime cases" because of the seriousness of those crimes. It specifically argued that any variance based on Irey's "diminished capacity, aberrant behavior, or family ties and responsibilities" would result in an unreasonable sentence. The government also pointed to precedent establishing that a guidelines sentence may be appropriate even where,

in the government's words, the defendant's "psychological evaluation [had] found that he was not a significant risk to children or likely to molest children in the future." See United States v. Scott, 426 F.3d 1324, 1327, 1330 (11th Cir. 2005).

In anticipation of the argument that Irey's actions were "not purely volitional," the government argued that Irey "has not shown that his mental condition is outside the heartland of similar cases" and cited two of our decisions in support of that proposition. See United States v. Caro, 309 F.3d 1348, 1353 (11th Cir. 2002) ("[M]ost people who collect a sizeable amount of child pornography are in someway addicted to collecting it."); United States v. Miller, 146 F.3d 1281, 1285 (11th Cir. 1998) ("Nor would poor impulse control be unusual [for a collector or purveyor of child pornography], regardless of whether it stemmed from an impulse control disorder. . . . An impulse control disorder is not so atypical or unusual that it separates this defendant from other defendants."). Acknowledging that Irey may have "rationalized his crimes against children by failing to perceive the harm he was inflicting," it argued that "is not so uncommon as to take this case out of the heartland." In regard to the possibility that Irey, as a pedophile, may have "experience[d] self-deceptive thought processes," the government emphasized that he "has horribly sexually abused numerous children over a period of years." The government's sentencing memorandum concluded by arguing that "any variance under 18 U.S.C. § 3553(a) would be unreasonable because there is nothing unusual about the nature or circumstances of this offense or the defendant's personal characteristics."

B. The Reports of the Psychiatrist and Psychologist

In connection with sentencing defense counsel hired two experts in the field of psychology and psychiatry, and he furnished their reports to the court. One of the reports was from Dr. Fred Berlin, who is board-certified in both general and forensic psychiatry. Although he did not testify at the sentencing hearing, his report is mentioned in the Presentence Report, a copy of it was attached to defense counsel's objections to the Presentence Report, and it was discussed by Dr. Shaw, who did testify at the hearing.

Dr. Berlin reported that Irey "has a psychiatric disorder known as heterosexual pedophilia," which means "he experiences a strong sexual attraction to prepubescent girls; girls who ordinarily are less than thirteen-years-of-age." Dr. Berlin stated that Irey was capable of relating intimately to an adult woman, but he found that Irey "experienced intense sexual cravings for female children as well." Irey was "highly sexualized" and admitted to having "engaged in other forms of sexually disordered behavior with prostitutes (e.g. sadomasochistic acts), and . . . having viewed images involving bestiality on the Internet." Nonetheless, Dr. Berlin asserted that "to the best of my knowledge and belief, he has never coerced an unwilling person against their will."[6]

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[6] In view of the undisputed facts, that statement is astounding. We find it inconceivable that Dr. Berlin believes impoverished Cambodian children, who are among the most vulnerable people in the world, willingly submitted

Dr. Berlin gave his opinion that "a sexual disorder such as pedophilia does not develop as a consequence of a volitional decision." He also stated, however that "[a]lthough it is not [Irey's] fault that he has the disorder, it is his responsibility to do something about it." Dr. Berlin thought that Irey needed professional treatment but he also pointed out that "[e]ven without treatment, in the past, he had been able to refrain from any sexual contact with children within the United States."

Dr. Berlin's report stated that he had found no evidence to suggest that Irey was "characterlog[icall]y flawed," and concluded that he was "not generally antisocial or psychopathic in his psychological makeup," nor was he "a man who has generally lacked a sense of conscience." Instead, he thought that Irey had often simply been unable to "readily appreciate the extent of his improprieties" with the children. Dr. Berlin denied that Irey had "a malicious disregard for the well-being of the girls in question." Instead, in his professional opinion, "Mr. Irey did have a genuine affection and concern for those youngsters at that time" and actually thought he was helping the little girls he was sexually abusing.[7] Dr. Berlin's view is that, except for the

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to being bound by duct tape and sexually penetrated orally, vaginally, and anally by a 200-pound adult male, as well as to having various objects, including glow sticks, dildos, and cockroaches pushed into their vaginas, while they, in Irey's words, "Hurt in Pane." The only plausible explanation is that Irey was less than forthcoming with Dr. Berlin about the details of what he had done to those children "many many times" over at least a four-year period.

[7] Irey himself probably would disagree with Dr. Berlin's opinion that he had not fully appreciated the wrongfulness of his conduct. In a letter he wrote to the

fact that he had spent four or five years raping, sodomizing, and sexually torturing some of the most vulnerable children in the world, Irey is "an otherwise decent man."

Dr. Ted Shaw, a psychologist, was also retained by the defense, and he submitted a "psychosexual evaluation report" on behalf of Irey. When Dr. Shaw evaluated Irey on August 23, 2007, Irey was at the Lifestream Behavioral Center in Leesburg, Florida, "on conditional release from jail." He was undergoing treatment for alcohol abuse problems and sexual addiction. According to Dr. Shaw, a review in May 2007 indicated that Irey "was

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district court a week before sentencing, Irey admitted to having visited the child brothels in Cambodia "many many times," even though he knew the girls were minors and that it was wrong, adding "but it was to[o] late, my sex addiction was now in full control of me." Later in the letter, Irey said: "I [had] wanted to stop this insanity for at least 15 years, but I could not. I was sneaking out to pick up prostitutes, I was leading a double life. I had developed this terrible dark side."

Dr. Berlin's theory that Irey had not fully appreciated the wrongfulness of what he was doing to the little children in Cambodia apparently was too much of a stretch for Irey's defense counsel. Counsel did argue in his sentencing memorandum that "Irey has been diagnosed as a pedophile, and had a limited ability to control the behavior supporting the offense of conviction." He never argued, however, that Irey had not realized what he was doing was wrong or failed to appreciate fully the wrongfulness of his criminal conduct—not in his sentencing memorandum, or at the hearing, or in his panel brief, or in his en banc brief. More importantly, the district court never found that Irey had not fully appreciated the wrongfulness of his conduct, but only that the conduct was not purely volitional and instead was in substantial part due to his pedophilia.

making appropriate progress," although his wife and children "refused to attend personal counseling" as part of the family sessions.

Irey admitted to Dr. Shaw that he had used prostitutes in this country and in doing so had contracted a venereal disease, which he passed along to his wife. Irey had also "experimented with bisexuality" and had "enjoyed consensual bondage" with adult females. Irey "described a lack of interest in well-endowed women," telling Dr. Shaw that "when he married his wife she was thin and had small breasts," but "[h]er physique has changed over the years." Irey admitted that he had visited child brothels in Cambodia "for the past five years." He did, however, lie to Dr. Shaw about some of the details of his sexual abuse of children.[8] Irey acknowledged, though, that the children "suffer the most and are victims."

Dr. Shaw's report noted Irey's escalating sexual interest over the preceding ten years, which "could be described as a 'sexual addiction,' with many behaviors and an obsessive fixation which included frequent masturbation, anonymous sex with prostitutes and the eventual use of brothels in

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[8] Irey told Dr. Shaw that some of the girls he had sex with "were in their early teens, with the youngest being about twelve." In fact, as Irey knew and would later acknowledge, the photographs he made showed that many of the girls were younger than twelve and some were as young as four years of age. Irey also told Dr. Shaw that he would only have oral sex with the girls who appeared younger than twelve years of age. However, a photograph Irey made shows him having vaginal intercourse with a young girl, and "[i]mbedded on the image [in all capitals] is the phrase: 'Big Cock Push Bug Deep Into 9 Yo Girl, She Hurt in Pane.'"

Cambodia." He described Irey as "sexually obsessed for at least the last ten years," and stated his opinion that "Irey's paraphilias clearly drove his behaviors, in spite of being an otherwise moral and responsible individual, upon whom many people, including family, clients and employees, depended."

Under one of the risk assessments that Dr. Shaw applied, Irey's score "places him in the Medium-Low risk category for sexually re-offending." Another one, the Minnesota Sex Offender Screening Tool-Revised, resulted in a score that placed Irey in the "Moderate Risk Range." More specifically, Dr. Shaw said, "the five-year, ten-year, and fifteen-year recidivism rates for individuals in the development research study with Mr. Irey's score are 12%, 14%, and 19%." Overall, he reported, "the dynamic and static factors, suggest a moderate to low moderate risk of a new charge," which "can be reduced through continued treatment and informed supervision upon his release."

C. The Sentence Hearing

The court began the sentence hearing, which was held on January 29, 2008, by noting that it had reviewed the sentencing memoranda, the presentence report, and Dr. Shaw's report. The first witness was Dr. Shaw. He gave his opinion that Irey has "a long-standing problem with sexual obsession," and "something like sexual addiction," and in American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000) (DSM-IV TR) terms, "obsessive-compulsive type disorder, not the full-blown disorder, but with the sexual behavior being the

most prominent feature." So far as he could tell, there was not enough evidence to diagnose Irey with any personality disorder. Dr. Shaw said that Irey is "very low in psychopathy" and explained that "he has this encapsulated area where he was cheating, where he was lying, where he was violating laws; but outside of that, he was – appears to be – to have been a law-abiding citizen."

As for Irey's risk of sexually abusing children again, Dr. Shaw testified that: "He's essentially in the medium low to medium or moderate risk categories, which is—which is below a threshold of likely." The risk might be further reduced with the use of certain drugs, but he was hesitant to recommend that the court require them given all of their side effects and the fact "that they're not always useful." He also noted that Irey is going to be older "when and if he's released, and he's going to have experienced a reduction naturally in testosterone and a reduction in sex drive." Dr. Shaw summed up the risk situation:

> So overall, I find him to be, as I said, a moderate risk, a low-moderate risk, low in psychopathy. He does have—has deviant interests. Those interests, he himself has been working on reducing and are likely somewhat reduced already. They are fueled by obsessive thinking and masturbating and by the sex acts themselves.

The court questioned Dr. Shaw about pedophilia, asking him: "I mean, is it an illness? I mean, how would you describe that as a mental health professional?" After noting that Dr. Berlin

was on the committee that defined it for purposes of the DSM–IV TR, Dr. Shaw testified:

> I'll take my shot at it. It is a disorder of sexual interest and behavior, and you can have the diagnosis with only the interest. So you could be fascinated, sexually attracted to children and never act on it, and—but if it troubled you or caused any problems for you, you would still be diagnosable with that disorder, and that is being attracted to or engaging in behaviors, sexual behaviors, with prepubescent children.
>
> So it is clearly a well-recognized disorder, and I thought that Dr. Berlin did a good job of saying that it's not a disorder that someone chooses. It's something that is within you and you have some tendency towards it.
>
> And frankly and quite sadly, I think the availability of child images, particularly on the Internet, has fueled an epidemic of pedophilia that was kind of probably in the background, people might not have even known that they suffered from it, and then come across these images. But nonetheless, it is a treatable disorder. So it's a disorder that has different origins.
>
> And Mr. Irey talks about how the disorder manifested itself for him in his being provided with a very young—or very young prostitutes without asking for them initially; but then he found himself first repelled but then attracted to them, and that's that sort of natural biological disorder part of it that's different from the moral and ethical issues.

> So for another person, if they had been in the same situation, they may have been repulsed and stayed repulsed by it and, you know, not—just said, "Don't ever do that again and I'm not interested;" but that led him into a spiral of interest in children sexually. So that's the way that it's manifested itself here.

The district court then remarked that "people accuse me of not knowing what I'm talking about when I say it's an illness, and maybe I don't. That's why I'm asking you." The court continued:

> And I guess the question is, from a standpoint of criminology, is a person who acts out as a result of this condition acting totally of rational free will or is that person acting out as a result of something that is in essence an illness that he at that point has no control over? Do you understand what I'm saying?

Dr. Shaw answered:

> I do, Your Honor. I think that the fact that pedophilia is not an underlying element for competency or sanity – it is an Axis I, treatable disorder. Those of us who have been in the field – I've been in the sex offender field actually since 1976; and there were pioneers in the field before me, long before me. We have been treating pedophilia for decades.
>
> It is—I think that the problem that a lot of lay people have is in distinguishing between people who are disordered, seriously

disordered, and curability versus treatability. Pedophilia is very treatable, and there are many pedophiles in the community who are doing just fine and managing their behavior.

As I'm sure you know, probationers, U.S. probationers, are now subjected to an annual polygraph about whether they are following the rules of their probationer or whether they are re-offending. Pedophiles are capable of not re-offending, even if they have an urge, in the same way that compulsive dessert eaters can choose to not eat dessert.

They have different levels of struggling, and there are aids to that: Good supervision, good treatment, replacing those needs with healthy needs. A lot of treatment is helping people understand the origin of their disorder and then teaching them to, first of all, be aware of the danger signs, the risks to relapsing, but at the same time replacing the way that they were meeting the needs met with the disordered behavior, meet them in healthy ways; and that's something people can be taught. People like Mr. Irey, who's bright, who has been successful in business, he can certainly learn the techniques that we teach to prevent—be responsible himself for preventing a reoffense.

It's—I think because we like to say, "You can't be cured"—in other words, the best long-term treatment is to be alert to the problem and to—that's not a cure. Cures, you can forget about it. Just go be around kids again and don't worry about it. That, we can't do.

> But there are, you know, thousands of pedophiles and child molesters, different, out there, in my belief, who aren't re-offending, who are in recovery and doing just fine. The new treatments that we use are, I think, very effective.

On cross-examination, Dr. Shaw confirmed for the record that Irey was "a pedophile with a sexual interest in children younger than 13, prepubescent children." As for Irey's risk assessment, he conceded the study it relied on was not confined to pedophiles but also included other sex offenders. Dr. Shaw also acknowledged that he had not looked at any of the photographs of Irey's victims and did not know how many victims there were. When asked if it would surprise him to know that Irey had sexually molested "over 50 children," he responded that it wouldn't because Irey "did admit that he had become more and more obsessed and was returning to Asia more and more often."

Other than Dr. Shaw the only people who submitted statements for, or testified at, the sentence hearing did so as character witnesses for Irey. Although they had not been willing to fully participate in family therapy with him, all of Irey's immediate family did make statements on his behalf either by video (wife, daughter, and a son) or in person (two other sons) at the sentence hearing. In his short video statement, Irey's youngest son told about his father building a clubhouse and dirt bike track. In her short video statement, Irey's daughter (age 16) described her father as "loving" and said that he "has taught me how to be strong, respectful, honorable, loyal, and the list can go on and on."

In her video statement Irey's wife of 25 years described him as "a loving and wonderful husband and father" who is "mindful of other people's feelings." She said that he was a member of the Rotary Club, the Masons, the United Way, the YMCA, the local theater, the Shriners, and a charity called "Give Kids the World." He was so good and kind that he had even rescued and taken in a stray dog. Indeed, she proclaimed that she had been "very blessed to have been part of Bill's life for so many years. He's taught me so many things." After watching her video statement, the district court stated: "I understand that Mr. Irey has been a good family man and has family support."

Irey's oldest son (age 24) testified that his father had taught him "so much about life and love" and called him "my hero, my star, our father." His middle son (age 20) testified that Irey had taught him "to stick up for the little guy because a lot of times nobody else will," and that Irey did things "to make this world what we all envision it could be." A friend of Irey's testified that Irey had used his contacts in China to help out the family of that man's wife in China. He also added that during his 32 years of law enforcement in New York City he had seen "a lot of bad people and Billy Irey is not one of those people." Irey's brother testified about how Irey, when a senior in high school in 1976, had loaned his coat to an accident victim, which was typical of his "random acts of kindness," and how if someone was in need, you could count on him.

No one was more effusive in his praise of Irey than his nephew. He recounted how his uncle had helped get him a computer for college, had listened to him talk about his aspirations, and had helped others over the years. He proclaimed that Irey "had a way of touching people's lives in a way that I've never seen before," and "bring[ing] out the best in every single person that he meets." Irey is, in his view, "the most spirited and the most giving person" and "overall is just one of a kind." He even said that: "I like to think that when God created Uncle Bill, He took a step back and He said, 'I'm really going to like this one.'"

At the conclusion of the evidence, defense counsel argued that a sentence to the statutory maximum of 30 years would be "greater than necessary for Mr. Irey in light of the mitigation that's been presented." He assured the court that he was not trying to minimize "the gravity of the acts with which Mr. Irey is charged," but argued that they were "a compartmentalized area of his whole being that is a result of his pedophilia." He argued that Dr. Shaw's testimony and Dr. Berlin's report established that "the behavior of a pedophile is not totally volitional, that is, it is dictated in some degree by the disease itself." He also argued that Irey had "lived, other than this disease and this addiction, an exemplary life." Counsel cited three decisions, two from this Court and one from the Eighth Circuit, which affirmed sentences below the guidelines range in cases involving defendants convicted of distributing child pornography over the internet.[9]

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[9] The decisions cited were United States v. McBride, 511 F.3d 1293 (11th Cir. 2007), United States v. Gray, 453

Counsel told the court that if Irey were sentenced to the 30-year guidelines range sentence he would be 81 years old when he got out.[10] Instead of that sentence, counsel asked the court to impose one of "between 15 and 20 years here with up to lifetime supervised release." Counsel asserted that a 15-or 20-year sentence "would make him 66 or 71 when he got out, if he served the entire sentence."[11]

F.3d 1323 (11th Cir. 2006), and United States v. White, 506 F.3d 635 (8th Cir. 2007). In none of those cases did the defendant actually produce the child pornography he distributed. And there is no indication that the acts depicted in the pornography involved in those three cases even came close to the depraved nature of the acts graphically depicted in Irey's pink wall series.

[10] That statement is not entirely accurate. Under 18 U.S.C. § 3624 federal inmates routinely receive 54 additional days credit toward the service of their sentence at the end of each year that they have served with good behavior (with the credit for the last year or part thereof being prorated and credited within the last six weeks of the imprisonment). Because of § 3624 Irey could complete a 30-year sentence in 26 years and 2 months, and he would be 76 years old when released, not 81. See 18 U.S.C. § 3624; 28 C.F.R. §§ 523.20, 541.13 (2005); see also Barber v. Thomas, 130 S.Ct. 2499 (2010).

[11] The "if he served the entire sentence" condition is important, because Irey would not have to serve his entire sentence unless he behaved so badly in prison that he did not qualify for the § 3624 additional credit for good behavior. See supra note 10. Assuming good behavior, Irey would complete a 15-year sentence in 13 years and 1 month, and be released at age 63; he would complete a 20-year sentence in 17 years and 5 months, and be released at age 68. See 18 U.S.C. § 3624; 28 C.F.R. §§ 523.20, 541.13 (2005); see also Barber, 130 S.Ct. 2499.

After defense counsel made his argument, the court asked if Irey wanted to say anything. In brief remarks, Irey apologized to "the government agents that have had to get involved in my horrible deeds," to "the federal attorney's office," to the court, "to the children that I have harmed over the last several years of going to Cambodia," to his family, and to "my employees, that I've pretty much hurt them." He also said: "I've hurt a lot of people and I can't undo that, but I can learn from that and I'm willing to learn."

The AUSA then argued in favor of the advisory guidelines range sentence of 30 years. She reminded the court that Irey "is not being prosecuted for being a pedophile; he's being prosecuted for the acts that he committed." She argued that: "As an alcoholic does not have to drive a car, a pedophile doesn't have to put themselves in a brothel in Cambodia, which this defendant did for years and years and years, Your Honor."

The AUSA reminded the district court that the description of Irey's conduct in the Presentence Report included: "writing filth on children's bodies, inserting objects into them, binding them up and tying them up, treating them – posing them as trophies, and having several of them engaging in acts with him and with other children at the same time, [and] this is not run-of-the-mill child pornography . . . if there is such a thing." She stressed that this is a production case, and "the defendant clearly had two different parts of his life going on; but in this one, he was the star, the writer, the director, and, at the end, a person who ruined, just absolutely and forever ruined over 50 children's lives."

During her argument, the AUSA showed the court photographs of about fifty of the children taken from Irey's pink wall series; none of those particular photos showed any obscene acts or revealed private parts; they did show some of the children's faces. She pleaded with the court to "look at these babies' faces," pointing out that "some of these children are four or five, six years old. They're babies, Your Honor." Referring to the child pornography that Irey produced involving these same children, she pointed out that "[t]heir pictures will forever be out there online. They will be victimized over and over again . . . . Their lives can never be the same."

The AUSA also informed the court that when Irey was caught and the cache of child pornography he had produced was found on his computer, the National Center for Missing and Exploited Children contacted law enforcement agencies, which expressed astonishment that "you've found the person who produced the 'pink wall' series." The series "was infamous on the Internet, and is turning up even in cases now, that we're finding more and more of the pink wall series of these young children."

The AUSA also pointed out that "in some of the photographs, the defendant is smiling as he perpetrates this abuse." She asked: "How can we square this with the stories we've heard today? How can you treat a dog better than you treat a human being, a defenseless baby?" Answering her own question, she argued that "[i]t makes no sense other than there's something really, really bad about the defendant." She also asked the court to consider the offense and victimization, and argued that "[t]he message we send to people who would do this has to be considered." She pointed out that the defendant's

conduct, according to his own admissions, was "not even just child rape and child molestation, but dealing with prostitutes, lying when he doesn't have to," and stealing. She characterized him as a person "who lies and steals and hurts other people."

Focusing on the 1,200 images in the collection of child pornography that Irey produced, the AUSA argued that there is no better word for it than "torture." She pointed out that what Irey did to the small children produced "some of the most egregious images that the agents have ever seen," and Irey had been doing it for years and on many occasions and paying up to $1,500 for the rights to use particular children in any way he wanted.

The AUSA concluded her remarks by asking the court to impose a 30-year sentence, the maximum the law allowed, in order to do "justice for these children who cannot plead on their own behalf."

D. The Sentence Findings and Sentence

The court began its sentencing remarks by stating that sentencing was the hardest thing it had to do and was "particularly difficult in cases like this." The court noted the statutory minimum or floor was 15 years and the ceiling was 30 years, which was also what the court called "the guideline score." The court observed that while it was to take into account the guidelines score and consider that score as a benchmark throughout the analysis of the 18 U.S.C. § 3553(a) factors, the guidelines are not mandatory; while an important element of the sentencing calculus, the result of the guidelines calculation is only advisory. The court then stated

that it needed to look at the other § 3553(a) factors on an individualized basis in order to determine an appropriate sentence for the case.

Because of the importance of the court's sentence findings and explanation, we set them out in full:

> The first thing I need to do is consider the nature and circumstances of the offense, and I cannot quarrel with Ms. Hawkins' description of that. The conduct here was horrific. The victims were numerous and perhaps the most vulnerable of the world's society. So I don't think there's any question but we're dealing with here with an offense that rises to the very top in terms of its seriousness and its effect on other human beings.
>
> These young children were victims who may never, never overcome their abuse. I recognize, of course, that Mr. Irey and his family and friends are also victims here; and society at large is a victim because, as Dr. Shaw indicated, with every new development in human history, there seems to come good and bad with it; and with all the good of the Internet, perhaps one of the bad features of it is that it has made possible what Dr. Shaw describes as an epidemic of child pornography. And, unfortunately, we here in the court system witness that and have to deal with it; and our government, in an effort to deal with it, has imposed—has criminal penalties, very harsh sentences for conduct like this.
>
> So in terms of the characteristics of the

offense, the seriousness of it itself, the long-standing, long-term engagement in it certainly does not mitigate in favor of any leniency.

But next I need to look at the history and characteristics of the defendant. By all accounts, Mr. Irey has been a good husband and father for his wife and children and a good friend to his friends and a good person to his community. The lies and thefts, I think, referred to by Ms. Hawkins were essentially part of his effort to cover up his illness, because I think other than the acts of Mr. Irey, there's no indication that he has engaged in any other sort of criminal conduct or conduct representing poor character.

Also, in terms of the characteristics of the defendant, I think we're just beginning to learn what pedophilia is and how to deal with it. I think if you look at the reports of the mental health people here and into the literature, which I have done, Mr. Irey's acts that bring him here today, I think it's safe to say, were not purely volitional. I think they were due in substantial part to a recognized illness. And while it does not excuse his conduct and he will still be held accountable for it, I think it would be inappropriate to ignore that fact.

I also think it's appropriate to credit the opinion of the mental health professionals who indicate that Mr. Irey is pursuing treatment and is doing so apparently successfully and, in the view of the mental health professionals, is treatable and has a low risk of recidivism.

Of course, all of that is somewhat academic because by the time he gets out of prison, he'll be most likely at an age where recidivism would be unlikely, just from a physiological standpoint.

Mr. Irey obviously has a very loving family, and I know he's proud of his family and deserves whatever credit he should take for having produced these people who have come here today to speak for him. And I know it was difficult for the family, but I think that your support is important and says a lot, not only about your family, but about Mr. Irey himself.

Another aspect of the defendant's character, as I have alluded to, of course, not his character but his individual characteristics, is his age. As I indicated, even the minimum sentence here, he's going to be an old man. I guess that makes me an old man, but he will certainly be an older man when he gets out of prison; and that's, I think, a factor to take into account.

There are other aspects of the statute that essentially are subjective in nature. Of course, adequate deterrence to criminal conduct. I mean, a serious sentence is hopefully going to deter others from conducting similar affairs, although when we're dealing with an illness like this, I'm not sure that that rationally follows. But, nevertheless, deterrence is an appropriate consideration, and a stiff sentence is in keeping with the seriousness of this offense.

As far as protecting the public from

further conduct of this defendant, for the reasons I've indicated, I think that militates against a 30-year sentence, given his age, given the fact that he apparently recognizes now, from everything I've seen, he recognizes the condition that has led him to commit these acts and to put himself and his life and his family's life in the order that it is. He's taken the first step toward rehabilitation and appears to be amenable to treatment and also, according to the mental health professionals, is of low risk of recidivism. So I don't think society needs further protection from him, at least beyond the statutory minimum sentence.

As often happens in these cases, my judgment—and I am a fallible human being. So what I do is not necessarily right. I just do the best I can under the circumstances. It comes down to my view of what promotes respect for the law and provides just punishment. And here, as indicated, I think that a 30-year sentence, given the personal factors that I have touched upon, is greater than necessary to accomplish the statutory objectives.

On the other hand, in light of the seriousness of the crimes, I think a sentence above the mandatory minimum is called for.

So having said all that, it's the judgment of the Court that the defendant, William Irey, is committed to the custody of the Bureau of Prisons to be imprisoned for a term of 210 months.

Upon release from imprisonment, Mr. Irey, you'll be placed on supervised release for

a term of life. The mandatory drug testing requirements of the Violent Crime Control Act are imposed. While on supervised release, you must comply with the standard conditions adopted by this court.

In addition, I'm going to require you to participate in a substance abuse program and to follow your probation officer's instructions in that regard. You must also participate in a mental health program specializing in sex offender treatment and follow your probation officer's instructions in that regard as well.

You must register, as appropriate, with any state offender registration agency and cooperate with your probation officer with respect to complying with that directive.

I'll impose the standard terms concerning risk control, that is, no direct contact with minors under 18 without the written approval of your probation officer, prohibition for possessing, subscribing to, viewing any video or magazines, literature otherwise depicting children in the nude or sexually explicit positions. You shall not possess or use a computer with access to any online service without written approval of your probation officer.

Also, I'm going to impose a search requirement, that you submit to a search of your person, residence, place of business or any other area under your control at a reasonable time and in a reasonable manner based on any reasonable suspicion by your probation officer of contraband or evidence violating these terms of supervised release.

> You must cooperate with the collection of DNA.
>
> I'm not going to impose a fine. You are ordered, however, to pay a special assessment of $100, which shall be due immediately.
>
> It's ordered that you shall forfeit to the United States those assets identified in your Plea Agreement that are subject to forfeiture.
>
> As indicated, the Court has imposed a sentence below the applicable guideline sentence for the reasons indicated.

The defendant had no objection to any aspect of the sentence, including the 210-month (17 ½-year) term of imprisonment. On behalf of the United States, the AUSA objected to the downward variance of 150 months (12 ½ years) as unreasonable "based on the factors adduced in this record, particularly the seriousness and long-term nature of the offense." She characterized the variance as being "almost half." The court responded that the sentence was "more like 60 percent of the guideline, not half."

Actually, the sentence of 210 months amounts to 58 percent of the advisory guidelines sentence of 360 months, or a downward variance of 42 percent from the guidelines sentence. But, of course, the court could not sentence below the statutory minimum of 15 years in any event. In light of that, it is also accurate to say that within the statutorily prescribed range of 15 to 30 years (a spread of 15 years or 180 months), the court imposed a sentence that was 83 percent from the maximum and only 17 percent above the minimum. As Judge Hill put it, the district court had "move[d] so far downward from the maximum upper sentencing limit that he nearly

reache[d] the minimum limit." United States v. Irey, 563 F.3d 1223, 1227 (11th Cir. 2009) (Hill, J., concurring), vacated, 579 F.3d 1207 (11th Cir. 2009) (en banc).

IV. Our Review of the Reasonableness of the Sentence

The United States appealed, contending that in view of the facts and circumstances the sentence was unreasonably light, amounting to an abuse of discretion. A panel of this Court disagreed and affirmed the sentence. Id. After voting to rehear the case en banc, we directed the parties to brief and argue this issue: "Is the sentence imposed in this case unreasonable and thereby an abuse of the district court's sentencing discretion?"

A. The Scope, Standard, and Importance of Appellate Review

1. The Pre-Booker Era

Our review of a sentence that is challenged on substantive grounds is deferential but still important, as the history of substantive review of federal sentences indicates. Before the Sentencing Reform Act was enacted in 1984, there was practically no appellate review of federal sentences, except to ensure that they did not stray outside of the statutory minimum and maximum. So long as sentencing judges stayed within the statutory boundaries, they had unbridled discretion to arrive at any sentence they pleased. See Dorszynski v. United States, 418 U.S. 424, 431–32, 94 S. Ct. 3042,

3047 (1974) ("[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end."); United States v. Tucker, 404 U.S. 443, 447, 92 S. Ct. 589, 591 (1972) ("[A] sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review."). The result, predictably, was widespread disparity in sentences, a problem that gave rise to a lot of criticism. See, e.g., S. Rep. No. 98-225, at 38–39 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3221–22 (complaining of the "unjustifiably wide range of sentences" different judges imposed on similarly situated defendants).

One of the leading champions of change was Marvin Frankel, who was himself a district judge. Frankel described federal sentencing as it then existed as "a non-system in which every judge is a law unto himself or herself and the sentence a defendant gets depends on the judge he or she gets." Marvin E. Frankel, Jail Sentence Reform, N.Y. Times, Jan. 15, 1978, at E21. He proposed a number of reforms, some of which were similar to what would become the sentencing guidelines system. See Marvin Frankel, Criminal Sentences: Law Without Order 113–14 (1972). One of Judge Frankel's key proposals was that federal sentences be subject to at least a limited degree of appellate review. See id. at 75–85. The standard he recommended was abuse of discretion, see id. at 82–84, which he described in these terms:

> Correctly understood, the "discretion" of judicial officers in our system is not a blank check for arbitrary fiat. It is an authority, within the law, to weigh and appraise diverse

> factors (lawfully knowable factors) and make a responsible judgment, undoubtedly with a measure of latitude and finality varying according to the nature and scope of the discretion conferred. But "discretionary" does not mean "unappealable." Discretion may be abused, and discretionary decisions may be reversed for abuse.

Id. at 84. The goal of the new system, Frankel explained, was "[s]entencing [that] would be more just. Like cases would tend to be treated alike," because "[t]he most fundamental of our legal principles—'equal justice under law'—demands that this be so." Frankel, Jail Sentence Reform, at E21; see also Martin v. Franklin Capital Corp., 546 U.S. 132, 139, 126 S. Ct. 704, 710 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."). Frankel and other reformers won the debate, although it took a number of years to enact the necessary legislation and put the new sentencing system in place.

The legislation was the Sentencing Reform Act of 1984, whose primary purpose was to channel district courts' sentencing discretion and reduce disparity in sentencing. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3586 (1988) and 28 U.S.C. §§ 991–998 (1988)); Mistretta v. United States, 488 U.S. 361, 364–69, 109 S. Ct. 647, 651–53 (1989) (discussing background to the Sentencing Reform Act and the guidelines). The Act, which became effective on November 1, 1987, created the

Sentencing Commission and gave it the responsibility to develop a system of sentencing guidelines.

The sentencing guidelines were binding, and district courts were required to state reasons for imposing a particular sentence. 18 U.S.C. § 3553(b)–(c). A court could impose a sentence outside the applicable guidelines range only if it found the existence of an aggravating or mitigating circumstance "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Id. § 3553(b)(1). In making such a finding, a sentencing court could consider only the guidelines themselves and the policy statements and official commentaries of the Sentencing Commission. Id. As the Supreme Court later noted, departures on this basis were rarely available because "[i]n most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible." United States v. Booker, 543 U.S. 220, 234, 125 S. Ct. 738, 750 (2005).

Restraints on the exercise of discretion by district courts are enforced through appellate review, and the Sentencing Reform Act of 1984 provided for it. 18 U.S.C. § 3742. Under the Act, a sentence could be appealed on the ground that: (1) it was imposed in violation of the law; (2) it was imposed as a result of an incorrect application of the guidelines; (3) the term of imprisonment, fine, or supervised release was greater than the maximum or less than the minimum established in the guidelines range; or (4) it was imposed for an offense for which there is no sentencing guideline and was "plainly

unreasonable." Id. § 3742(a)–(b).

Departures from the guidelines range were reviewed under the third of the statutorily listed grounds for appeal, see id. at § 3742(a)(3), (b)(3), and the resulting sentence was vacated if the appellate court determined that it was "unreasonable" in light of the factors to be considered in imposing a sentence under § 3553(a) and the district court's reasons for the sentence. See Booker, 543 U.S. at 261, 125 S. Ct. at 765 (quoting the pre-2003 version of 18 U.S.C. § 3742(e)(3) (1994 ed.)). In conducting its review, the court of appeals accepted the district court's findings of fact unless they were clearly erroneous, which was decided only after giving due regard to that court's opportunity to judge the credibility of witnesses. 18 U.S.C. § 3742(e) (1994 ed.). The reviewing court also gave "due deference" to the district court's application of the guidelines to the facts. Id.

The district court's decision to depart from the guidelines was reviewed for abuse of discretion in a three-step process. See Koon v. United States, 518 U.S. 81, 98–100, 116 S. Ct. 2035, 2047–48 (1996). First, the court of appeals deferentially reviewed the district court's determination of whether the facts of the case took it outside the "heartland" of the applicable guideline. United States v. Hoffer, 129 F.3d 1196, 1201 (11th Cir. 1997). A case was outside the heartland only if there was something unusual, either about the defendant or the circumstances surrounding the crime, that warranted a different sentence. See United States v. Miller, 146 F.3d 1281, 1284 (11th Cir. 1998). That determination was made by comparing the facts of the case to the facts of other cases falling within the heartland of the guidelines. Id. As the second step in reviewing

departure decisions the court of appeals determined for itself whether the departure factor used by the district court "has been categorically proscribed, is encouraged, encouraged but taken into consideration within the applicable guideline, discouraged, or not addressed by the [Sentencing] Commission." Hoffer, 129 F.3d at 1201. In the third step the appeals court reviewed with deference the district court's finding that the factor on which the departure was based did exist. Id.

In 2003 Congress amended the sentencing statute to provide for closer review of sentences that were outside the guidelines. Under the amendments a sentence could be vacated if the departure from the guidelines range was based on a factor that: (1) did not advance the objectives of sentencing set forth in § 3553(a)(2); (2) was not authorized under § 3552(b); or (3) was not "justified by the facts of the case." 18 U.S.C. § 3742(e)(3)(B); Pub. L. 108-21, § 401(d)(1), 117 Stat. 670. The court of appeals made each of those determinations de novo. Id. § 3742(e); see also United States v. Pressley, 345 F.3d 1205, 1209 n.1 (11th Cir. 2003). The 2003 amendments also specified that a sentence must be vacated if it departed "to an unreasonable degree" from the guidelines range, in light of the § 3553(a) factors and of the district court's stated reasons for imposing the particular sentence. Id. § 3742(e)(3)(C). The result was that an outside-the-guidelines sentence could be vacated if it was based on an impermissible factor or if the degree of departure was unreasonable. A sentence within a correctly calculated guidelines range, however, was essentially unreviewable as long as the district court considered the § 3553(a) factors and explained its reasoning. See id. § 3553(c).

The 2003 amendments restricted even further the ability of a district court to depart downward from the guidelines in cases involving sex crimes against children. In that type of case a court could depart downward only if it found two things: (1) the existence of a mitigating circumstance that had been "affirmatively and specifically identified as a permissible ground of downward departure" by the sentencing guidelines or policy statements, taking into account any amendments by Congress; and (2) that mitigating circumstance had not been taken into consideration by the Sentencing Commission in formulating the guidelines range for that offense. Id. § 3553(b)(2).

The guidelines themselves also sharply limit the permissible grounds for downward departure in cases of sexual abuse of children, specifically disallowing departures based on diminished capacity (U.S.S.G. § 5K2.13), aberrant behavior (id. § 5K2.20), substance abuse (id. § 5K2.22), or family responsibilities and community ties (id. § 5H1.6). They provide that generally an offender's age and health are not relevant, except in rare cases where the offender is so elderly and infirm that home confinement would be an effective alternative to prison. Id. §§ 5H1.1, 5H1.4. The guidelines also provide that charitable contributions and a defendant's mental and emotional condition generally are not appropriate grounds for departure. Id. §§ 5H1.11, 5H1.3.

2. The Booker Era

Then came the Booker decision in 2005. In it the Supreme Court held the sentencing statute

unconstitutional insofar as the guidelines were mandatory and to the extent that they allowed the upper limits of the sentence to depend on facts that had not been established by a plea of guilty or proven to a jury beyond a reasonable doubt. Booker, 543 U.S. at 244, 125 S. Ct. at 756. Instead of striking down the entire guidelines system, the Court salvaged much of it by making the guidelines advisory rather than mandatory. Id. at 245, 125 S. Ct. at 756–57. The salvage work required the Court to sever and excise two provisions of the Act: (1) § 3553(b)(1), which had required the district court to impose a sentence within the guidelines range; and (2) § 3742(e), which had set forth the scope and standard of review of sentences. Id. at 259, 125 S. Ct. at 764. The excision of § 3742(e) left a gap: § 3742 still created appellate jurisdiction for sentencing review, but with subsection (e) gone it no longer specified the standard of review.

The Supreme Court filled that gap by inferring a standard of review from "related statutory language, the structure of the statute, and the sound administration of justice." Id. at 260–61, 125 S. Ct. at 765 (quotation marks omitted). Those considerations, as well as "the past two decades of appellate practice in cases involving departures," implied "a practical standard of review already familiar to appellate courts: review for unreasonableness." Id. (brackets omitted); see 18 U.S.C. § 3472(e)(3) (1994 ed.).[12] The Court reasoned

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[12] The "related statutory language" and the "two decades of appellate practice" the Supreme Court drew from did not include provisions added by the 2003 amendments or experience under them. Because the purpose and effect of those amendments had been "to make Guidelines sentencing

that appellate courts had ample experience applying the "reasonableness" standard to sentences outside the guidelines range before the 2003 amendments and to sentences for offenses not addressed by the guidelines. Booker, 543 U.S. at 262, 125 S. Ct. at 766. The Booker Court saw appellate review of sentences as important to the new system, because it "would tend to iron out sentencing differences," avoiding undue disparity. Id. at 263, 125 S. Ct. at 767.

Section 3553(a) plays a critical role in appellate review of sentences, just as it does in the initial sentencing decision. Booker instructs us that not only must district courts apply the § 3553(a) factors in making their sentencing decisions, but courts of appeals must apply those same factors in determining whether a sentence is reasonable. Id. at 261, 125 S. Ct. at 766 ("Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable."); accord United States v. Pugh, 515 F.3d 1179, 1188 (11th Cir. 2008) ("Booker further held that in performing this review, we must measure 'reasonableness' against the factors outlined by Congress in 18 U.S.C. § 3553(a)."); United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005) (per curiam) ("We must evaluate whether the sentence imposed by the district court fails to achieve the purposes of sentencing as stated in section

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even more mandatory than it had been," the amendments were tossed onto the legislation scrap pile with the comment that "the reasons for [them] have ceased to be relevant." Booker, 543 U.S. at 261, 125 S. Ct. at 765.

3553(a).")[13]

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[13] Section 3553(a) reads in its entirety:

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such

Read in light of earlier decisions, the "reasonableness" standard Booker adopted entails review for abuse of discretion that accords "substantial deference" to the district court's sentencing decisions. Koon, 518 U.S. at 97–99, 116 S. Ct. at 2046-47. Pre-Booker decisional law, of course, only applied the reasonableness standard to sentences that departed from the guidelines range or to sentences for offenses not addressed in the guidelines. See id. at 98–99, 116 S. Ct. at 2046–47. After Booker, the abuse of discretion standard outlined in Koon applies more broadly to the district judge's sentence decision, whether the sentence is within or without the guidelines range. See Rita, 551 U.S. at 364, 127 S. Ct. at 2472 (Stevens, J., concurring).

Two years after Booker, the Supreme Court addressed in greater detail the sentence review function of a court of appeals, leaving no doubt about

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amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

the importance of that function. See Rita, 551 U.S. 338, 127 S. Ct. 2456. As we pointed out at the beginning of this opinion, the opening line of the Rita opinion categorically states that courts of appeals are to "review federal sentences and set aside those they find 'unreasonable.'" Id. at 341, 127 S. Ct. at 2459. And later in the Rita opinion the Supreme Court explains that, in the world according to Booker, courts of appeals exist to correct substantively unreasonable sentences imposed by the district courts. Id. at 354, 127 S. Ct. at 2466–67.

The specific holding of Rita is that a court of appeals may presume that a sentence within the guidelines range is reasonable. Id. at 347, 127 S. Ct. at 2462. The Supreme Court believed that such a presumption simply reflects the fact that when both the sentencing judge and Sentencing Commission have reached the same conclusion as to the proper sentence, it "significantly increases" the likelihood that the sentence is reasonable. Id., 127 S. Ct. at 2463. After all, the Court explained, Congress directed both the Sentencing Commission and the sentencing judge to carry out the same basic § 3553(a) objectives; the guidelines themselves reflect application of the § 3553(a) factors, and so should the district court's sentencing decision. Id. at 347–48, 127 S. Ct. at 2463. It follows that when a particular sentence is consistent with the guidelines' application of the § 3553(a) factors in the "mine run" of cases, it is "probable" that the sentence is reasonable. Id. at 351, 127 S. Ct. at 2465. If the sentence is not consistent with the guidelines that same probability does not exist, although the reviewing court may not presume a sentence that is outside the guidelines is unreasonable, id. at 354–55,

127 S. Ct. at 2467.

The decision in Gall v. United States, 552 U.S. 38, 128 S. Ct. 586 (2007), illustrates the importance of all the facts and circumstances to the reasonableness of the sentence. As a sophomore in college Gall had participated in a conspiracy to distribute ecstasy. Id. at 41, 128 S. Ct. at 591–92. His role was limited to delivering drugs between conspirators. Id., 128 S. Ct. at 592. Later Gall voluntarily stopped using drugs himself, and seven months after joining the conspiracy he withdrew from it and told the others he was quitting. Id. Drug free, Gall graduated from college and became a master carpenter. Id. at 41–42, 128 S. Ct. at 592. Two years after withdrawing from the conspiracy, Gall was questioned by federal agents and admitted his participation. Id. Three and a half years after he had withdrawn from the conspiracy and turned his life around, Gall was indicted for conspiracy to distribute illegal drugs. Id. He pleaded guilty. Id. His co-conspirators, who had not withdrawn from the conspiracy, received sentences ranging from 30 to 36 months. Id. at 54–55, 128 S. Ct. at 599–600.

Gall's guidelines range was 30 to 37 months. Id. at 43, 128 S. Ct. at 593. The district court varied downward from that range to a sentence of probation, largely because Gall had been young and immature when he committed the crime, he had withdrawn from the conspiracy years before the charges were filed, and he had made something of himself. Id. at 43–44, 128 S. Ct. at 593. When the government argued for a guidelines range sentence on the ground that the three co-conspirators had received sentences in that range, the district court noted that, unlike Gall, the other conspirators had

continued with the conspiracy. Id. at 54–55, 128 S. Ct. at 599–600.

The court of appeals vacated the probationary sentence as unreasonable, concluding that the district court had erred by giving too much weight to Gall's voluntary withdrawal, his age at the time of the offense, and his post-offense rehabilitation, and too little consideration to the need to avoid unwarranted sentence disparities. Id. at 45, 128 S. Ct. at 594. The Supreme Court reversed that decision after discussing at some length "the unique facts of Gall's situation." Id. at 54, 128 S. Ct. at 599.

In doing so, the Court reiterated that all sentences, whether within or without the guidelines, are to be reviewed only for reasonableness under an abuse of discretion standard. Id. at 46, 128 S. Ct. at 594. It rejected any requirement that an outside-the-guidelines sentence must be justified by "extraordinary" circumstances, and rejected any "rigid mathematical formula" that uses the percentage of departure as the standard for determining the strength of justification required for a specific sentence. Id. at 47, 128 S. Ct. at 595. At the same time, however, the Court said that the sentencing court must give "serious consideration" to the extent of any departure from the guidelines, and must offer "sufficient justifications" for its conclusion that an unusually harsh or light sentence is appropriate. Id. at 46, 128 S. Ct. at 594. That means, the Court explained, that the justification for the deviation from the guidelines range must be "sufficiently compelling to support the degree of the variance." Id. at 50, 128 S. Ct. at 597.

About appellate review, the Supreme Court held in Gall that "[i]n reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines," in addition to the sentencing court's justifications. Id. at 47, 128 S. Ct. at 594–95. While rigid mathematical formulas and proportionality tests cannot be used, the Court concluded that "the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant," id. at 41, 128 S. Ct. at 591, and that "a major departure should be supported by a more significant justification than a minor one." Id. at 50, 128 S. Ct. at 597.[14] In other words, the justification for the variance must be "sufficiently compelling to support the degree of the variance." Id. Checking to see that the justification is sufficiently compelling remains the duty of the court of appeals. At the same time, the appellate

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[14] The difficulty of the distinction that the Supreme Court drew in this regard has not gone unnoticed. See, e.g., United States v. Levinson, 543 F.3d 190, 197 n.6 (3d Cir. 2008) (noting "[a]s an example of the challenge" in post-Booker sentence review the "somewhat mixed messages that can be drawn" from Gall's statement ruling out proportionality but embracing the requirement of a greater justification for major variances); see also United States v. Feemster, 572 F.3d 455, 467 (8th Cir. 2009) (Colloton, J., concurring) (after Gall, "one searches in vain for a principled basis on which to conduct a consistent and coherent appellate review for reasonableness"); United States v. Evans, 526 F.3d 155, 168 (4th Cir. 2008) (Gregory, J., concurring) ("I must conclude that the Court has left the specifics of how appellate courts are to conduct substantive reasonableness review, charitably speaking, unclear.").

court may not presume that a sentence outside the guidelines is unreasonable and must give "due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." Id. at 51, 128 S. Ct. at 597. The fact that the court of appeals "might reasonably have concluded that a different sentence was appropriate" is not sufficient to justify reversal. Id.; see also Talley, 431 F.3d at 788 ("A district court may impose a sentence that is either more severe or lenient than the sentence we would have imposed, but that sentence must still be reasonable.").

In Gall's case the court of appeals erred by giving "virtually no deference" to the district court's decision that a significant variance from the guidelines was justified. Gall, 552 U.S. at 56, 128 S. Ct. at 600. The Supreme Court decided that it was entirely reasonable for the district court to give substantial weight to Gall's voluntary withdrawal. Unlike all his co-defendants and "the vast majority of defendants convicted of conspiracy in federal court," Gall's efforts at self-rehabilitation began long before he got caught, which gave the district court "greater justification for believing Gall's turnaround was genuine." Id. at 56–57, 128 S. Ct. at 600–01. It was also reasonable for the district court to conclude that a guidelines range sentence for Gall would have created unwarranted sentencing disparities, because his co-conspirators who were sentenced within the guidelines had not voluntarily withdrawn from the conspiracy and had not shown any comparable rehabilitation. Id. at 55–56, 128 S. Ct. at 600; see also Lyes v. City of Riviera Beach, 166 F.3d 1332, 1342 (11th Cir. 1999)(en banc) ("[I]t is worth noting that equal treatment consists not only of treating

like things alike, but also of treating unlike things differently according to their differences."). The district court reasonably concluded that under the unusual facts of that case the § 3553(a) factors "on the whole" justified the below-the-guidelines sentence it imposed on Gall. Gall, 552 U.S. at 59–60, 128 S. Ct. at 602.

The same day that Gall was released the Supreme Court also issued its decision in Kimbrough v. United States, 552 U.S. 85, 128 S. Ct. 558 (2007), which involved sentencing for an "unremarkable drug-trafficking offense" and an unremarkable firearm possession offense, id. at 110, 128 S. Ct. at 575. Thanks in large part to the much-criticized 100 to 1 crack/powder cocaine disparity in the guidelines, the bottom of the advisory range for the combined charges was 19 years. Id. at 92, 128 S. Ct. at 565. After considering all of the § 3553(a) factors and the strong upward influence of the crack/powder disparity on the guidelines range, the district court concluded that a 19-year sentence would have been greater than necessary to accomplish the purposes of sentencing set forth in § 3553(a). Id. at 92–93, 128 S. Ct. at 565. For that reason, it varied downward to a sentence of 15 years. Id. at 93, 128 S. Ct. at 565.

The government appealed the sentence and the Fourth Circuit reversed solely because of its view that a variance based on disagreement with the crack/powder ratio in the guidelines was per se unreasonable. Id. After the Supreme Court granted review, the government argued against the variance on that same ground. Id. at 101–07, 128 S. Ct. at 570–74. It asserted that while the guidelines are usually only advisory, the 100 to 1 crack/powder ratio guidelines were an exception because Congress

had directed sentencing courts to follow that ratio. Id. at 101–02, 128 S. Ct. at 570. The government's position, in essence, was that the crack/powder ratio in the offense level part of the guidelines was a little pocket of mandatoriness in an otherwise advisory system.

The Supreme Court rejected that position, disagreeing with all of the government's arguments that Congress had required the Sentencing Commission and sentencing courts to follow the 100 to 1 ratio in every case. Id. at 102–11, 128 S. Ct. at 570–76. The government did not contend that the below-the-guidelines sentence was unreasonable for any other reason, and the Court found that it was reasonable. Id. at 110–11, 128 S. Ct. at 575–76; see also Spears v. United States, — U.S. —, 129 S. Ct. 840, 843–44 (2009) (per curiam) (clarifying that Kimbrough means "district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines").

The Kimbrough decision involved a specific part of the guidelines, the one involving the peculiar crack/powder disparity, which the Sentencing Commission itself had consistently and emphatically criticized as at odds with the goals behind § 3553(a). See Kimbrough, 552 U.S. at 111, 128 S. Ct. at 576; see also Pugh, 515 F.3d at 1189 n.7 ("Kimbrough primarily involved issues related to the guidelines for crack cocaine offenses."). The Supreme Court's opinion in that case, however, also contains a number of observations of broader application. For example, the Court discussed "the discrete institutional strengths" of sentencing courts and the Sentencing Commission, and how those different

strengths affect the amount of respect due a court's decision to vary from the guidelines range. Kimbrough, 552 U.S. at 109, 128 S. Ct. at 574–75. It said that decisions to vary "may attract greatest respect when the sentencing judge finds a particular case outside the heartland to which the Commission intends individual Guidelines to apply." Id. at 109, 128 S. Ct. at 574–75 (quotation marks omitted). By contrast, "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case." Id., 128 S. Ct. at 575 (quotation marks omitted). The Court in Kimbrough also reiterated the importance of appellate review of sentences for substantive reasonableness. See id. at 107–08, 128 S. Ct. at 573-74 (explaining that appellate review along with the ongoing revision of the guidelines "will help to avoid excessive sentencing disparities" and variations among district courts).

3. The Abuse of Discretion Standard

Since the Supreme Court's Booker decision it has been "pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." Gall, 552 U.S. at 46, 128 S. Ct. at 594; see also Pugh, 515 F.3d at 1191 (explaining that the Supreme Court's teachings "leave no doubt that an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that appellate review has not been extinguished"). That familiar

standard "allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." United States v. Frazier, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc) (quotation marks omitted) (quoting Rasbury v. I.R.S., 24 F.3d 159, 168 (11th Cir. 1994)). As we have explained, "under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a de novo standard of review." Id. (quoting Rasbury, 24 F.3d at 168); see also, e.g., Ledford v. Peeples, 605 F.3d 871, 922 (11th Cir. 2010) ("[T]he relevant question [when reviewing for abuse of discretion] is not whether we would have come to the same decision if deciding the issue in the first instance. The relevant inquiry, rather, is whether the district court's decision was tenable, or, we might say, 'in the ballpark' of permissible outcomes.").

"A district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." United States v. Campa, 459 F.3d 1121, 1174 (11th Cir. 2006) (en banc). As for the third way that discretion can be abused, a district court commits a clear error of judgment when it considers the proper factors but balances them unreasonably. See Ameritas Variable Life Ins. Co. v. Roach, 411 F.3d 1328, 1330 (11th Cir. 2005) ("[A]n abuse of discretion can occur . . . when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear

error of judgment." (emphasis added) (quotation marks omitted)). The principle that discretion can be abused by unreasonably balancing proper factors is solidly established in Supreme Court precedent and our circuit law. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257, 102 S. Ct. 252, 266 (1981) ("The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." (emphasis added)); Ford v. Brown, 319 F.3d 1302, 1308 (11th Cir. 2003) ("We conclude that the district court overlooked some highly relevant factors, and that it ultimately struck a balance that was an abuse of discretion.").

In the context of sentencing, the proper factors are set out in 18 U.S.C. § 3553(a), and a district court commits a clear error in judgment when it weighs those factors unreasonably, arriving at a sentence that does not "achieve the purposes of sentencing as stated in § 3553(a)." Pugh, 515 F.3d at 1191 (quoting Talley, 431 F.3d at 788 (quotation marks omitted)). In order to determine whether that has occurred, we are "required to make the [sentencing] calculus ourselves" and to review each step the district court took in making it. Id.; see also Booker, 543 U.S. at 261, 125 S. Ct. at 766 ("Those [§ 3553(a)] factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable."); Pugh, 515 F.3d at 1194 ("Indeed, we could not begin to review the reasonableness of a sentence without examining all

of the relevant factors embodied in Section 3553(a).").

In reviewing the reasonableness of a sentence, we must, as the Supreme Court has instructed us, consider the totality of the facts and circumstances. Pugh, 515 F.3d at 1192 (unreasonableness of sentence depends "on an examination of the 'totality of the circumstances'" (quoting Gall, 552 U.S. at 51, 128 S. Ct. at 597)). To the extent that the district court has found facts, we accept them unless they are clearly erroneous. Id. At the same time we can and should consider "additional salient facts that were elicited, and uncontroverted." Id. The difference is between contradicting a factfinding, on the one hand, and ignoring uncontroverted facts that the district court failed to mention on the other. That difference is important because a district court cannot write out of the record undisputed facts by simply ignoring them. The failure to mention facts may well reflect the district court's judgment that those facts are not important, but the importance of facts in light of the § 3553(a) factors is not itself a question of fact but instead is an issue of law. See United States v. Taylor, 487 U.S. 326, 337, 108 S. Ct. 2413, 2419–20 (1988) ("Factual findings of a district court are, of course, entitled to substantial deference and will be reversed only for clear error. A judgment that must be arrived at by considering and applying statutory criteria, however, constitutes the application of law to fact and requires the reviewing court to undertake more substantive scrutiny to ensure that the judgment is supported in terms of the factors identified in the statute." (citations omitted))[15]

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[15] Judge Tjoflat's separate opinion asserts that it is

After performing the required analysis, we are to vacate the sentence if, but only if, we "are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable

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"deconstructing" the abuse of discretion standard. Concurring and Dissenting Op. of Tjoflat, J. (hereafter "Separate Op. of Tjoflat, J."), at 193; see also id. at 188. It is deconstruction with a wrecking ball. According to that opinion, the weight given to each piece of evidence is a factfinding, id. at 189; the degree of seriousness of an offense is a factfinding, id. at 189 n.59; the importance given to each factor is a factfinding, id. at 190 n.61; the sentence necessary to satisfy each § 3553(a)(2) purpose is a factfinding, id. at 189; in other words, everything that goes into a sentence is a factfinding subject only to clearly erroneous review. To the contrary, the Supreme Court has applied the abuse of discretion standard to the weight the sentencing court has given to the evidence and the importance it has given to the § 3553(a) factors. See Gall, 552 U.S. at 57, 128 S. Ct. at 600. Many of the "factfindings" Judge Tjoflat's separate opinion identifies are actually applications of statutory law to facts, resulting in a determination that we review for abuse of discretion when considering whether "the § 3553(a) factors, on the whole, justif[y] the sentence" a district court has imposed. Id. at 60, 128 S. Ct. at 602. A sentencing decision is a classic "judgment that must be arrived at by considering and applying statutory criteria," which "requires the reviewing court to undertake more substantive scrutiny to ensure that the judgment is supported in terms of the factors identified in the statute." Taylor, 487 U.S. at 337, 108 S. Ct. 2413, at 2419–20. And, contrary to Judge Tjoflat's opinion, our recognition of the fact that statutory criteria are at play does not mean that we are reviewing de novo the district court's balancing of those criteria.

sentences dictated by the facts of the case." Pugh, 515 F.3d at 1191 (quotation marks omitted); accord United States v. Shaw, 560 F.3d 1230, 1238 (11th Cir. 2009); United States v. McBride, 511 F.3d 1293, 1297–98 (11th Cir. 2007); United States v. Clay, 483 F.3d 739, 743 (11th Cir. 2007). We are not often "left with [that] definite and firm conviction" because, as we have explained, our examination of the sentence is made "through the prism of abuse of discretion." Pugh, 515 F.3d at 1191. But sometimes we are. See United States v. Livesay, 587 F.3d 1274, 1278-79 (11th Cir. 2009) (vacating as "patently unreasonable" a sentence of probation for participant in billion-dollar fraud scheme and holding that only a "meaningful period of incarceration" would fulfill the goals of sentencing under § 3553(a)); Pugh, 515 F.3d at 1188–94 (vacating as substantively unreasonable a sentence of probation for receiving and distributing child pornography); United States v. Martin, 455 F.3d 1227, 1238–39 (11th Cir. 2006) (vacating a seven-day sentence for billion-dollar securities fraud as "shockingly short" and "wildly disproportionate" to the seriousness of the offense, even though the defendant had rendered substantial assistance that was extraordinary); United States v. Crisp, 454 F.3d 1285, 1290 (11th Cir. 2006) (vacating as "outside the range of reasonableness" a sentence of five hours' imprisonment for bank fraud even though the defendant had provided substantial assistance that was crucial in the prosecution of his co-defendant). Out of the hundreds of sentences that we have reviewed up to this point in the five years since the Booker decision, those are the only four we have found to be substantively unreasonable.

Looking at sentencing decisions through the

prism of discretion is not the same thing as turning a blind eye to unreasonable ones. And, as we said in Pugh, "the district court's choice of sentence is not unfettered." Id. The fetters on a district court's sentencing discretion are the requirement of reasonableness and the existence of appellate review to enforce that requirement. While those fetters are loosened by the substantial discretion we afford district courts in sentencing, at the boundaries of reasonableness the fetters do fetter. See Frankel, Criminal Sentences 84 ("'[D]iscretionary' does not mean 'unappealable.' Discretion may be abused, and discretionary decisions may be reversed for abuse."); cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 416, 95 S. Ct. 2362, 2371 (1975) ("That the court's discretion is equitable in nature hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." (citation omitted)).[16]

We may not—it bears repeating—set aside a sentence merely because we would have decided that another one is more appropriate. Gall, 552 U.S. at 51, 128 S. Ct. at 597. See generally Frazier, 387 F.3d at 1259; Ledford, 605 F.3d at 922. A district court's sentence need not be the most appropriate one, it need only be a reasonable one. We may set aside a sentence only if we determine, after giving a full

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[16] Although the burden of persuasion may not be decisive in many cases, it is on the party attacking the sentence as unreasonable. Pugh, 513 F.3d at 1189; Martin, 455 F.3d at 1237; Talley, 431 F.3d at 788. The burden being there tends to reinforce the discretionary zone in which the district court acts when it decides on an appropriate sentence, but that zone is neither limitless nor impervious to review.

measure of deference to the sentencing judge, that the sentence imposed truly is unreasonable.[17]

Judge Edmondson's dissenting opinion argues that in reviewing a sentence for substantive reasonableness we may not decide whether the district court placed unreasonable weight on any of the § 3553(a) factors. See Dissenting Op. of Edmondson, J., at 241 ("[T]o grant something in the record more or less value than the District Judge did and so to conclude that the record overall weighs more heavily for a higher sentence . . . oversteps [appellate] authority."). We disagree for several reasons.

First, the only authority the dissenting opinion cites for that proposition is Gall, which actually contradicts it. The Supreme Court decided that Gall's sentence was reasonable only after reviewing the weight the district court had assigned to various factors as well as its decision that the § 3553(a) factors, as a whole, justified the sentence.

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[17] Some of our colleagues take the position that by finding the sentence in this case unreasonable we are simply disagreeing with the district judge's decision and substituting our own view of a proper sentence for his. See Dissenting Op. of Barkett, J., at 254; Dissenting Op. of Edmondson, J., at 241, 249; Separate Op. of Tjoflat, J., at 217–21. Of course, the fact that we find the district court's sentence unreasonable necessarily means that we disagree with it. That is true in every instance in which an appellate court finds a sentence substantively unreasonable. If the appellate court agreed with a sentence it would not find the sentence unreasonable, so it is illogical to suggest that disagreement with a sentence somehow means that an appellate court is not properly carrying out its duty to review the reasonableness of the sentence.

See Gall, 552 U.S. at 56–60, 128 S. Ct. at 600–02. It stated that the district court "quite reasonably attached great weight to the fact that Gall voluntarily withdrew from the conspiracy after deciding, on his own initiative to change his life," which "len[t] strong support to the District Court's conclusion that Gall is not going to return to criminal behavior and is not a danger to society." Id. at 57, 128 S. Ct. at 601. The Court also stated that the district court "quite reasonably attached great weight to Gall's self-motivated rehabilitation, which . . . lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts." Id. at 59, 128 S. Ct. at 602.[18] If appellate review did not extend to

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[18] Judge Tjoflat's separate opinion argues that we are disregarding Gall, an argument that is based on his reading of that decision to mean that appellate review of the weight put on the various § 3553(a) factors by the sentencing court is necessarily akin to de novo review of sentencing, which we may not undertake. See Separate Op. of Tjoflat, J., at 218 (asserting that one reason for the Supreme Court's conclusion in Gall that the Eighth Circuit's analysis "more closely resembled de novo review" than abuse of discretion review was that the court of appeals decided that the sentencing court "gave too much weight to Gall's withdrawal from the conspiracy" (citation omitted)). That reading of Gall, however, is a misreading of the decision, which actually confirms that appellate courts, with the proper measure of deference, should review the reasonableness of the weight placed on a § 3553(a) factor by the sentencing court. See Gall, 552 U.S. 56–57, 128 S. Ct. at 600–01. The Eighth Circuit's mistake was not that it had reviewed the district court's weighing of the statutory factors, but that in doing so it had asked the wrong question—whether "in its view" the sentence was

the weight placed on a § 3553(a) factor—as Judge Edmondson's dissenting opinion contends—those statements in Gall would make no sense.[19]

Second, the position that Judge Edmondson's dissenting opinion takes is inconsistent with the familiar abuse of discretion standard that the Supreme Court has told us to apply. As we have already explained, a district court commits a clear error of judgment, abuses its discretion, when it considers the proper factors but balances them unreasonably. See Piper Aircraft Co., 454 U.S. at 257, 102 S. Ct. at 266; Campa, 459 F.3d at 1174;

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appropriate—instead of whether the district court's weighing and the resulting sentence were reasonable. Id. at 56, 128 S. Ct. at 600.

[19] If an appellate court could not review the reasonableness of the weight the district court placed on a factor—if all that mattered was correct factfindings and accurate recitation of the applicable law—many of the Supreme Court's other statements in its Booker-through-Kimbrough decisions also would have little or no purpose. See, e.g., Gall, 552 U.S. at 47, 128 S. Ct. at 594–95 ("In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines."); Booker, 543 U.S. at 261, 125 S. Ct. at 766 ("Those [§ 3553(a)] factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable."); Kimbrough, 552 U.S. at 107–08, 128 S. Ct. at 573–74 (explaining that appellate review for reasonableness will help avoid excessive sentencing disparities). And there would have been no point at all in the Rita decision, which held that we may presume a sentence within the guidelines is reasonable. 551 U.S. at 347, 127 S. Ct. at 2462.

Ameritas Variable Life Ins., 411 F.3d at 1330; Ford, 319 F.3d at 1308. One purpose of reasonableness review is to correct those errors. If the weight given various factors could not be reviewed on appeal, there would be no way to serve that purpose. If appellate courts were limited to determining whether proper procedures were followed and whether factfindings are clearly erroneous, there would be no substantive review, only procedural review. See Gall, 552 U.S. at 51, 128 S. Ct. at 597 (defining procedural review to include a determination of whether the sentence was based on clearly erroneous facts). We would be back to "a non-system in which every judge is a law unto himself or herself." Frankel, Jail Sentence Reform, at E21.

Third, the position that the weight a sentencing court gives to the § 3553(a) factors may not be reviewed has been rejected not only by this Court but also by all of our sister circuits that have addressed the issue. See United States v. Russell, 600 F.3d 631, 633 (D.C. Cir. 2010) ("Substantive reasonableness is the catch-all criterion under which the reviewing court monitors (deferentially—for abuse of discretion) whether the district court has given reasonable weight to all the factors required to be considered."); United States v. Ressam, 593 F.3d 1095, 1031–32 (9th Cir. 2010) ("[I]t appears that the district court abused its discretion in weighing the relevant factors by giving too much weight to [the defendant's] cooperation and not enough weight to the other relevant § 3553(a) factors, including the need to protect the public."); United States v. Camiscione, 591 F.3d 823, 834 (6th Cir. 2010) ("General deterrence is one of the key purposes of sentencing, and the district court abused its

discretion when it failed to give that matter its proper weight." (quotation and other marks omitted)); United States v. Sayad, 589 F.3d 1110, 1118 (10th Cir. 2009) ("Unlike procedural reasonableness review, which focuses on the permissibility of relying on a particular factor, substantive reasonableness review broadly looks to whether the district court abused its discretion in weighing permissible § 3553(a) factors in light of the 'totality of the circumstances.'" (quotation marks omitted)); United States v. Cooks, 589 F.3d 173, 186 (5th Cir. 2009) (stating that a sentence is substantively unreasonable if it "does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors"); United States v. Moore, 565 F.3d 435, 438 (8th Cir. 2009) ("We may find an abuse of discretion where the sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but commits a clear error of judgment in weighing those factors." (quotation marks omitted)); United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008) (en banc) ("At the substantive stage of reasonableness review, an appellate court may consider whether a factor relied on by a sentencing court can bear the weight assigned to it."); United States v. Goff, 501 F.3d 250, 261 (3d Cir. 2007) ("[D]eterring the production of child pornography and protecting the children who are victimized by it are factors that should have been given significant weight at sentencing . . . ."); United States v. Hampton, 441 F.3d 284, 288–89 (4th Cir.

2006) (vacating sentence as substantively unreasonable because the district court gave "excessive weight" to one statutory factor and failed to account for others); see also Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331, 335–36 (1st Cir. 2008) (stating that, in general, abuse of discretion may occur if the court "fails to consider a significant factor in the decisional calculus, if it relies on an improper factor in working tha calculus, or if it considers all the appropriate factors but makes a serious error in judgment as to their relative weight."). We join those circuits in reaffirming that substantive review exists, in substantial part, to correct sentences that are based on unreasonable weighing decisions. If we accepted the position set out in Judge Edmondson's dissenting opinion, we would be the only circuit to do so.[20]

B. The Adequacy of the Sentence Findings and Explanation

Judge Tjoflat's separate opinion criticizes the

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[20] Each of the circuits we have cited has determined, at least implicitly, that the weight given each § 3553(a) factor may be reviewed in a principled fashion, and we agree. Even though "the appropriate weight given to each of the [§ 3553(a)] factors cannot be calibrated with a slide rule," Pugh, 515 F.3d at 1203, that does not mean appellate review of that weight is impossible; it only reinforces the deferential nature of the review. As we have emphasized, there is "a difference between deference and abdication." Crisp, 454 F.3d at 1290. If there were no difference, if we did not have a meaningful role to play, we would never have set aside any sentences as substantively unreasonable, but we have.

district court for not making more detailed sentence findings and not offering a better explanation for the sentence it imposed. Separate Op. of Tjoflat, J., at 199, 212–14. Irey's sentence, according to that separate opinion, is unreasonable because the district court failed to make "intelligible" and "specific" findings on the § 3553(a)(2)(A) factors, and because it did not "explicitly" weigh those factors. Id. at 212–13. About that criticism, we have four things to say. First of all, the adequacy of a district court's findings and sentence explanation is a classic procedural issue, not a substantive one. See Gall, 552 U.S. at 51, 128 S. Ct at 597 (explaining that "failing to consider the § 3553(a) factors, . . . or failing to adequately explain the chosen sentence," constitutes procedural error); United States v. Ellisor, 522 F.3d 1255, 1273 (11th Cir. 2008) (Tjoflat, J.). And in this case no one has ever argued that the district court committed any procedural error in sentencing. That possibility was not mentioned by either party in the district court, or in their briefs to the panel, or in the oral argument before the panel, or in the panel's opinion (which Judge Tjoflat joined), or in the en banc briefing instructions, or by the parties in their briefs to us, or at oral argument before us, or anywhere else at all until it emerged in Judge Tjoflat's separate opinion. The issue in this appeal has never been procedural reasonableness, but instead substantive reasonableness. Judge Tjoflat's opinion, although purporting to recognize that Irey's sentence cannot be vacated on procedural grounds, dresses up its own procedural objections to the sentence as substantive ones. No amount of rhetorical couture, however, can cover up the fact that the opinion really is complaining about the

procedural unreasonableness of the sentence, an issue that is not before us.

Second, even if that issue were before us, the district court was not required to make any more detailed findings or give a more thorough explanation than it did. In Rita the Supreme Court upheld the adequacy of a "sentencing judge's statement of reasons [which] was brief but legally sufficient." 551 U.S. at 358, 127 S. Ct. at 2469. It did so because the record showed that the judge listened to the evidence and arguments and was aware of the various factors the defendant put forward for a lesser sentence. Id. In sentencing the defendant the judge did not say much, and the Court acknowledged that he "might have said more," but it surmised that "[h]e must have believed that there was not much more to say." Id. Although the judge did not even state that he had considered the evidence and argument or why he rejected the arguments for a variance, it was enough that "the context and record" indicated the reasoning behind his conclusion. Id. at 359, 127 S. Ct. at 2469. No member of this Court has ever before indicated that a sentencing judge is required to articulate his findings and reasoning with great detail or in any detail for that matter. See, e.g., United States v. Sanchez, 586 F.3d 918, 935–36 (11th Cir. 2009) (Tjoflat, J.) ("In general, the district court is not required to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors. It is sufficient that the district court considers the defendant's arguments at sentencing and states that it has taken the § 3553(a) factors into account." (citation and quotation marks omitted)); United States v. Brown, 526 F.3d 691, 713 (11th Cir. 2008);

Ellisor, 522 F.3d at 1278.

Judge Tjpflat's separate opinion now asserts, however, that he would have this Court sitting en banc overturn our precedent on the amount of specificity required of a sentencing judge. Separate Op. of Tjoflat, J., at 186 n.56. While we as an en banc court can overturn our own precedent, see, e.g., Main Drug, Inc. v. Aetna U.S. Healthcare, Inc., 475 F.3d 1228, 1230 (11th Cir. 2007), we cannot overturn Supreme Court precedent. And the Supreme Court has already laid out the requirements for a sentencing court's recitation of its reasoning on each of the § 3553(a) factors:

> [W]e cannot read the statute (or our precedent) as insisting upon a full opinion in every case. The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word "granted," or "denied" on the face of a motion while relying upon context and the parties' prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge's own professional judgment.

Rita, 551 U.S. at 356, 127 S. Ct. at 2468. The depth of detail that Judge Tjoflat's separate opinion would require exceeds the requirements of that precedent. See id.; see also id. at 359, 127 S. Ct. at 2469 ("Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and

arguments, we do not believe the law requires the judge to write more extensively.").

Third, the district court's sentence findings and explanation, which we have set out in full, see supra at 30–34, are far more specific and detailed than we have seen in the vast majority of other cases where we have reviewed the substantive reasonableness of sentences. In fact, we cannot recall seeing sentence findings and explanations that were more specific and detailed than those in this case, although the substantive reasonableness of the sentence is another matter. We have never required or expected district judges to compose a doctoral thesis to explain why they have imposed a particular sentence.

Fourth, the problem with the district court's sentence findings and explanation is not that they are unintelligible or lacking in specificity or effort; instead, the problem is that the sentence is substantively unreasonable. That unreasonableness is the underlying cause for the Tjoflat opinion's criticism of the findings and explanation as not "intelligible," for its pronouncement that they "cannot be reconciled" with the sentence, and for its conclusion that in light of them the sentence is "inconceivable." Separate Op. of Tjoflat, J., at 210–13. The reason that the sentence when viewed against the findings is inconceivable, irreconcilable, and unintelligible is not the fault of the findings but of the sentence itself. The Tjoflat opinion confuses the unreasonableness of the sentence with an absence of stated reasons for it, and the impossibility of giving a reasoned basis for the sentence with a lack of effort on the part of the sentencing judge to do so.

We turn now to the task of explaining why, even under the deferential standard of review that applies, viewing the facts and circumstances of this case in light of the § 3553(a) factors leads to the conclusion that the downward deviation sentence the district court imposed in this case is substantively unreasonable.

C. Substantive Unreasonableness

The statutory minimum sentence applicable to this case is 15 years and the maximum is 30 years. The advisory guidelines range is 30 years, top and bottom. The district court deviated downward 12 ½ years to a sentence of 17 ½ years, which is only 2 ½ years above the statutory minimum. The downward variance was 42 percent.[21] Whether considered in absolute or percentage terms, it is a "major" variance in the legal parlance of sentencing law. See United States v. Smith, 573 F.3d 639, 660–61 & n.5 (8th Cir. 2009) (requested variance downward from a 360-month guidelines sentence to one of 240 months, a reduction of 33 percent, would have been "a major variance"); United States v. Abu Ali, 528 F.3d 210, 261 (4th Cir. 2008) (noting that a downward variance of 40 percent to a sentence of 30 years is "major"); see also United States v. Burns, 577 F.3d 887, 888-90, 896 (8th Cir. 2009) (a variance

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[21] As we have already noted, when viewed in terms of the statutorily permissible range of 15 to 30 years, the district court chose a sentence within that range (a spread of 15 years or 180 months) that was 83 percent below the maximum and only 17 percent above the minimum. See Irey, 563 F.3d at 1227 (Hill, J., concurring).

downward by 60 percent from a 360-month guidelines sentence to one of 144 months imprisonment is "beyond dispute" a major one).

Although there is no proportionality principle in sentencing, a major variance does require a more significant justification than a minor one—the requirement is that the justification be "sufficiently compelling to support the degree of the variance." Gall, 552 U.S. at 50, 128 S. Ct. at 597. The justifications the district court offered for its major variance downward in sentencing were not only insufficiently compelling to support the degree of the variance, but they were also insufficiently compelling to support any variance.

The district court's clear error in judgment becomes apparent when all of the facts and circumstances are considered in light of the § 3553(a) factors. What § 3553(a) requires is "a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)" of that subsection. Throughout his separate opinion (nineteen times by our count), Judge Tjoflat refers to the § 3553(a) requirement that a sentence be adequate but not excessive for the purposes set out in § 3553(a)(2) as "the parsimony principle" or "the parsimony requirement." Separate Op. of Tjoflat, J., at 158 & n.21, 159–60, 164, 168, 174–75, 183, 197–98, 203, 209, 222 n.91, 232 n.100. It is a term that has been used in a few other circuits. See, e.g., United States v. Carrasco-De-Jesus, 589 F.3d 22, 29 (1st Cir. 2009) (noting that the appellant "posits that the sentence violates the parsimony principle of 18 U.S.C. § 3553(a)"); United States v. Martinez-Barragan, 545 F.3d 894, 904 (10th Cir. 2008) ("[T]he district court must be guided by the 'parsimony

principle'—that the sentence be 'sufficient, but not greater than necessary, to comply with the purposes' of criminal punishment, as expressed in § 3553(a)(2).").

The problem with the parsimony terminology is that the statutory command has two components of equal standing, and it ignores one of them. The requirement is not merely that a sentencing court when handing down a sentence be stingy enough to avoid one that is too long, but also that it be generous enough to avoid one that is too short. Calling the statutory requirement "the parsimony principle" is as incomplete and inaccurate as it would be to call the requirement "the severity principle." The reason that defense counsel and those who argue for shorter sentences, either generally or in specific cases, like the term "parsimony principle" is that it tends to slant the discussion toward shorter sentences by emphasizing only that part of the twin requirements. But terminology that is less than completely accurate should not be used to guide judicial decisions.[22] A

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[22] The term "parsimony principle" is an example of what Holmes once referred to as an "inadequate catch word[ ]," which could by its "very felicity, delay further analysis." Oliver Wendell Holmes, Law in Science and Science in Law, 12 Harv. L. Rev. 443, 455 (1899).

Judge Tjoflat's separate opinion says that "[a]lthough the court quibbles with the label 'parsimony principle,' it does not disagree with the underlying concept." Separate Op. of Tjoflat, J., at 158 n.21. To the contrary, we emphatically disagree with the "parsimony principle" terminology and the concept that underlies it, which is that one of the two § 3553(a) principles is to be given predominance over the other. The term "parsimony principle" is an "inadequate catch word" that stacks the deck

more accurate term, if one is needed, might be "the Goldilocks principle," because the goal is to lock in a sentence that is not too short and not too long, but just right to serve the purposes of § 3553(a).[23] In this opinion, however, we will avoid using a catchword and simply apply the provision as Congress wrote it. We turn now to the sentencing factors set out in § 3553(a).[24]

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and we would prefer to deal with result-neutral terms.

[23] Research reveals that this thought has occurred to at least one other judge. See United States v. Pruitt, 502 F.3d 1154, 1175 (10th Cir. 2007) (McConnell, J., concurring) ("The § 3553(a) factors tell judges, like Goldilocks, not to sentence too high and not to sentence too low."), vacated, 552 U.S. 1306, 128 S. Ct. 1869 (2008).

[24] Judge Tjoflat's opinion interprets the statutory language of § 3553(a) to require the sentencing judge to identify a single "driving purpose," and then "explain why the driving purpose subsumes the other purposes." Id. at 173 n.37; see also id. at 191 ("[T]he (a)(2) purposes should not be weighed against each other; rather, the [district] court should identify the (a)(2) purpose that drives the sentence and fashion a sentence parsimonious to that purpose."); id. at 190–94 & n.63. Under that novel approach, the driving purpose the sentencing judge chose would run over all of the other purposes listed in the statute.

The statute directs courts to "impose a sentence . . . [that] compl[ies] with the purposes set forth" in § 3553(a)(2). 18 U.S.C. § 3553 (emphasis added). The direction is that the sentence comply with the "purposes" plural; four of them are listed in § 3553(a)(2), and they are joined by the conjunctive "and," not by the disjunctive "or." Id. at § 3553(a)(2)(A)–(D). The Tjoflat opinion cites no authority for the proposition that courts should pick one "driving purpose" to speed ahead and flatten the other three.

1. Section 3553(a)(1)

The first listed factor—it is actually two factors in one—that a district court must consider in sentencing, and that a court of appeals must consider in reviewing the sentence for substantive reasonableness, is "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). To a large extent "the nature and circumstances of the offense" component of this factor overlaps with the next listed consideration, which is "the need for the sentence imposed—to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," id. § 3553(a)(2)(A). For that reason, we will postpone some of our discussion of the nature and circumstances of the offense component of (a)(1) until we take up the (a)(2)(A) offense-related factor in the next section.

a. The "Victim"

Most of the district court's reasons for the

Not only do we disagree with the approach in Judge Tjoflat's opinion, but so does the Supreme Court. In explaining how § 3553(a)(6) directs sentencing courts to consider the need to avoid unwarranted sentencing disparities, the Court instructed us that "these disparities must be weighed against the other § 3553(a) factors." Kimbrough, 552 U.S. at 108, 128 S.Ct. at 574 (emphasis added). The Court did not say that the § 3553(a)(6) sentencing disparity factor folds into the § 3553(a)(2) purposes, and that one of those purposes then becomes the driving purpose behind the sentence, but instead that all of the § 3553(a) factors are to be weighed against each other in order to determine the proper sentence.

major variance it imposed relate to the "history and characteristics of the defendant" component of the § 3553(a)(1) factor, and it is here where most of the court's errors in judgment leading to the unreasonable sentence can be found. To begin with, the district court viewed Irey, who had raped, sodomized, and tortured fifty underage girls, as himself a victim. The court said exactly that: "I recognize, of course, that Mr. Irey and his family and friends are also victims here; and society at large is a victim because, as Dr. Shaw indicated . . . the Internet . . . has made possible an epidemic of child pornography." Dr. Shaw never said that Irey was a victim of the availability of child pornography on the internet. Nor did Dr. Berlin. Nor did defense counsel. Nor did Irey himself. The only one who saw Irey as a victim was the district court.

There are two problems with the district court's re-casting of the predator as prey: its factual premise and its legal premise. The problem factually is not with the court's explicit finding that the internet "has made possible an epidemic of child pornography." No one disputes that. Nor is the problem with the court's implicit finding that the availability of child pornography on the internet has caused some children to be sexually abused by pedophiles who would otherwise have restrained themselves. In discussing pedophilia generally, Dr. Shaw testified that the availability of child pornography on the internet "has fueled an epidemic of pedophilia that was kind of probably in the background, people might not have even known that they suffered from it, and then come across these images." So there is a basis in the record for finding that some pedophiles are excited to action by the

child pornography on the internet. That is not the factual problem.

The factual problem is, instead, with the district court's implicit finding that child pornography on the internet caused Irey, the only defendant before the court, to sexually abuse children. We know that it did not, and we know that from no less of an authority than Irey himself. In a letter he wrote to the district court a week before sentencing, Irey stated that he did not start viewing child pornography on the internet until after he had begun having sex with the little girls in Cambodia.[25] The government has insisted throughout this appeal, however, that it is not challenging any of the district court's factfindings, only the court's characterizations, its application of law to fact, the weight it assigned to various factors, and the overall reasonableness of the sentence it imposed. For that reason, we will not disturb the district court's clearly erroneous finding that the existence of child pornography on the internet enticed Irey to sexually

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[25] In his letter to the court, Irey stated: "I visited these brothels many many times after that. I knew that these girls were not 18. But it was to[o] late, my sex addiction was now in full control of me. After awhile I started to look for child porn on the internet". (emphasis added). And Dr. Berlin's report stated that: "Mr. Irey denied any sexual fantasies of children before he had the sexual experiences in the Cambodian brothels."

During oral argument before us, defense counsel conceded that Irey's own statements negated a finding that he saw child pornography on the internet that enticed him to travel to Cambodia and have sex with children. Counsel acknowledged it was "correct" that Irey "went to Cambodia and visited the child brothels first and then after a while he started looking for it on the internet."

abuse children or was a contributing cause of his doing so, and we will instead accept that finding as a given in our analysis.

The more fundamental problem with the district court's recasting of Irey the-criminal as Irey-the-victim is the legal premise behind it, one that suggests the criminal is like his victims. Irey is the wrongdoer, the predator, the victimizer. The little girls in Cambodia are the wronged, the prey, the victims. The district court should have kept the two separate and not commingled them in its thinking. Child molesters and the children who are their victims do not occupy the same moral plane or position or anything resembling it. A man who sexually violates little children is no more entitled to be considered a victim of child pornography on the internet than a defendant who rapes an adult woman is entitled to be considered a victim of sexually provocative images on television. The victims in this case are the underage girls, some as young as four years old, whom Irey violated for his own perverse pleasure, filming that violation for distribution worldwide. Suggesting that Irey, like those little children, was a victim is absurd. Even defense counsel refused to defend it before us.[26]

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[26] During oral argument, defense counsel was asked these questions and gave these answers:

> Q. What about his factfinding that Irey himself was a victim? What supports that?
>
> A. Judge, I think that his statement in that regard is unfortunate and I think it was in direct response to Dr. Sh—
>
> Q. You don't defend that statement do you?

A. I do not. The first quoted question in that exchange labeled the district court's statement a factfinding, but it

The district court's view of Irey as a victim permeated its reasoning and tainted its weighing of the § 3553(a) factors, including (a)(1), which is "the nature and circumstances of the offense and the history and characteristics of the defendant." The nature of an offense would tend to seem less morally outrageous if the one who committed it were himself a victim. And if the characteristics of the defendant include being a victim, he is naturally more sympathetic than otherwise.

b. The "Illness" of Pedophilia

Along these same lines, the district court insisted on describing Irey as suffering from the "illness" of pedophilia, while the two defense experts described it as a "treatable disorder."[27] The district court found that because he suffered from pedophilia: "Mr. Irey's acts that bring him here today, I think it's safe to say, were not purely volitional. I think they were due in substantial part to a recognized illness. And while it does not excuse his conduct and he will be held accountable for it, I think it would be inappropriate to ignore that fact."

The record does not support the district court's finding that because he is a pedophile Irey

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was not. Calling Irey a victim is a characterization, not a finding of fact.

[27] Under the DSM IV TR, pedophilia is a paraphilia and an Axis I disorder. Other examples of Axis I paraphilia disorders include voyeurism, exhibitionism, fetishism, frotteurism, transvestic fetishism, sexual masochism, and sexual sadism. DSM IV TR at 566–67.

could not much help raping, sodomizing, and sexually torturing little children, posing them as trophies, ans smiling while he did it. The record actually contradicts that finding. Dr. Berlin reported: "Although it is not his fault that he has the disorder [of pedophilia], it is his responsibility to do something about it." It could not be Irey's responsibility to do something about his pedophilia if he lacked the volitional capacity to do something about it. One is responsible for doing something only if one has the ability to do something about it. Both experts agreed that pedophilia was treatable. What Irey could have done about his pedophilia is seek treatment for it. He never once sought treatment for his pedophilia, which was part of what he described as his "terrible dark side," during the four or five years he was sexually abusing little children "many many times." Like most criminals, Irey stopped only when he got caught.

Not only that, but as Dr. Berlin noted, "[e]ven without treatment, in the past, [Irey] had been able to refrain from any sexual contact with children within the United States." The undisputed fact is that Irey was perfectly capable of not sexually abusing children where the risk of detection and punishment was high, which is why he consciously chose to commit his crimes against children halfway around the globe in a third world country where there was little or no risk from law enforcement. Irey's self-restraint when it was in his own best interest not to indulge his lust for children proves that his volition was not impaired to any extent worthy of weight in sentencing.

During the sentence hearing, the district court asked Dr. Shaw: "is a person who acts out as a result

of this condition acting totally of rational free will or is that person acting out as a result of something that is in essence an illness that he at that point has no control over?" Dr. Shaw refused to endorse the court's pedophiles-can't-much-help-it theory. Instead, he gave his expert opinion that while pedophilia is not curable, it is treatable and pedophiles can and many do avoid molesting children. Dr. Shaw stressed that "Pedophilia is very treatable, and there are many pedophiles in the community who are doing just fine and managing their behavior." He later reiterated that there are "thousands of pedophiles and child molesters, different, out there, . . . who aren't re-offending, who are in recovery and are doing just fine." The "many pedophiles in the community" could not be doing "just fine" and the "thousands of pedophiles . . . out there" could not be avoiding commission of offenses if, as the district court believed, the "illness" of pedophilia rendered the criminal acts of those who molest children "not entirely volitional." See generally Bruce J. Winick, Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis, 4 Psychol. Pub. Pol'y & L. 505, 524 (1998) ("People diagnosed with pedophilia do not molest children in the presence of police officers or in other situations presenting a high likelihood of apprehension. Rather, they act with stealth, deception, and premeditation in an effort to avoid detection. This is purposeful, planned, and goal-directed conduct, not spontaneous and uncontrollable action or action that is substantially beyond the individual's ability to avoid."); id. at 523–24 ("There is nothing in the diagnostic criteria for pedophilia or any of the other paraphilias that suggests that individuals diagnosed

with these disorders suffer from any cognitive impairment that affects their ability to understand the wrongfulness of their conduct or that renders them irrational in any respect or unable to control their actions. . . . Moreover, there is nothing in the clinical literature that suggests that sex offenders are unable to exercise self-control.").

The district court refused to acknowledge the line that both of the defense experts drew between pedophilia and child molestation—a line, as the AUSA argued, that is similar to the one between alcoholism and driving under the influence. Dr. Shaw attempted to explain to the court metaphorically the difference between having the urge and acting on the urge: "Pedophiles are capable of not re-offending, even if they have an urge, in the same way that compulsive dessert eaters can choose to not eat dessert." The district court did not heed the metaphor or the experts' reports or the testimony of Dr. Shaw, but instead reasoned that because pedophiles have the urge they have diminished volition when it comes to resisting the urge.

We would recognize this finding as clear error if the government had argued the point to us. Since it did not, we will accept as a fact, for this case only, the erroneous finding that when pedophiles molest children they are not acting in a "purely volitional" way but instead their crimes are "due in substantial part" to their pedophilia.[28]

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[28] Judge Tjoflat's separate opinion accuses us of using the reports we have cited to hold that the district court clearly erred in finding that pedophiles are not acting in a "purely volitional" way when they sexually abuse children. Separate Op. of Tjoflat, J., at 223 & n.93. In doing so that opinion ignores the fact that Dr. Shaw, whom the opinion

That finding, which we assume correct for this case, is relevant to the § 3553(a)(1) factor concerning "the nature and circumstances of the offense and the history and characteristics of the defendant." But the assumed fact cannot reasonably carry much weight. Not "purely volitional" does not mean not volitional, and "due in substantial part" does not mean due, period. The district court did not find that Irey could not help committing the crimes that he committed "many many times" over a period of four or five years. Perhaps the reason the court stopped short of finding Irey could not help it at all is that Irey obviously did help it when doing so suited his purpose of not getting caught. While in this country Irey refrained from committing any crimes against children, never once touching an American child in an inappropriate way, and instead consorted with adult prostitutes. It was while in Cambodia, where he could get away with sexually violating children, that he did it so "many many times." And he acted with cunning. As Judge Hill put it:

> I also disagree with the apparent weighty consideration that the sentencing judge gave to the notion that this defendant

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describes as Irey's "'star' witness," id. at 204, was himself careful to distinguish between pedophilia and child molestation, a distinction that the district court insisted on blurring. More fundamentally, Judge Tjoflat's separate opinion also disregards our clear statement, to which this footnote is attached, that because the government has not contested the point, we are accepting as a fact for purposes of this case the finding that when pedophiles molest children they are not acting in a "purely volitional" way but instead their crimes are "due in substantial part" to their pedophilia.

> acted on account of some type of "sickness." The defendant acted deliberately, cunningly and with obvious delight. He ruined the lives of at least forty-three children (that we know of) and then published his triumphs on the internet for all the world to see, complete with scurrilous black marker writings tattooed on the nine-year-old girls' skin.

Irey, 563 F.3d at 1227 (Hill, J., concurring).

Moreover, the "history and characteristics of the defendant" component of the § 3553(a)(1) factor is aimed at distinguishing among defendants who commit a particular offense or type of offense. The theory of the district court's finding, however, is one of non-distinction because it applies to virtually everyone who commits this type of crime. According to the district court's theory, pedophiles—not Irey in particular but pedophiles in general—share the characteristic of having impaired volition when it comes to sexually abusing children. They all have what the district court insisted on calling the "illness" of pedophilia. If the sexual molestation of children by pedophiles is not "entirely volitional," as the district court found and as we are assuming, then most sexual abuse of children is not "entirely volitional," because most of it is done by pedophiles. See Ryan C.W. Hall & Richard C.W. Hall, A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues, 82 Mayo Clinic Proc. 457, 458 (2007) ("An estimated 88% of child molesters and 95% of molestations (one person, multiple acts) are committed by individuals who now or in the future

will also meet criteria for pedophilia. Pedophilic child molesters on average commit 10 times more sexual acts against children than nonpedophilic child molesters." (footnotes omitted)).

This point is important because it matters whether the reason for the variance is a fact that takes the present case outside the heartland of cases covered by the individual guideline. The Supreme Court instructed us in Kimbrough that decisions to vary "may attract greatest respect when the sentencing judge finds a particular case outside the heartland to which the Commission intends individual Guidelines to apply." Kimbrough, 552 U.S. at 109, 128 S. Ct. at 574–75 (quotation marks omitted); see also Rita, 551 U.S. at 351, 127 S. Ct. at 2465 (the guidelines themselves foresee that they are not to apply to cases outside the heartland of cases). The Court stated that, by contrast, "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case." Kimbrough, 552 U.S. at 109, 128 S. Ct. at 575; see also Spears, 129 S. Ct. at 843 ("[Kimbrough's] implication was that an 'inside the heartland' departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily disagrees on a 'categorical basis') may be entitled to less respect.").

The district court's reliance on the theory that pedophiles have reduced volition, applying as it does to virtually all crimes involving sexual abuse of children, does not take this case outside the heartland to which the Commission intended the guidelines relating to sexual offenses against

children to apply. Instead, the pedophiles-are-ill variance is more properly seen as a variance based on the judge's view that the guidelines range for crimes involving the sexual abuse of children does not properly reflect § 3553(a) factors even in mine-run cases, i.e., in the vast majority of cases. For that reason, as Kimbrough teaches, the decision is not entitled to the "greatest respect" but instead should be subject to "closer review." Exercising that closer review, we reject as unreasonable and a clear error in judgment the district court's view that the guidelines involving sex crimes against children are too harsh in a mine-run case because pedophiles have impaired volition. The reasons should be apparent but, if not, we refer the reader to our upcoming discussion about the devastating and permanent harm that this type of crime inflicts on its young victims. See infra at 98–102; see also Garcia v. Quarterman, 456 F.3d 463, 471–72 (5th Cir. 2006) (capital case) ("The second error in Garcia's argument is the suggestion that pedophilia may be considered 'mitigating' of a defendant's moral culpability. No case has so held. . . . There is no sense in which reasonable people could view Garcia's pedophilia as morally mitigating of guilt, any more than reasonable people would find a defendant's uncontrollable compulsion to commit incest or eat human flesh 'mitigating.'"), vacated on other grounds, 257 Fed. App'x 717 (5th Cir. 2007).

c. Husband, Father, and Member of the Community

While considering the "the history and characteristics of the defendant" component of § 3553(a)(1), the district court also weighed in Irey's

favor his status as a family man and member of the community:

> By all accounts, Mr. Irey has been a good husband and father for his wife and children and a good friend to his friends and a good person to his community. The lies and thefts, I think, referred to by Ms. Hawkins were essentially part of his effort to cover up his illness, because I think other than the acts of Mr. Irey, there's no indication that he has engaged in any other sort of criminal conduct or conduct representing poor character.

That is unreasonable and a clear error in judgment on several different levels.

To begin with, the judge's reasoning is like saying that other than the fact he had an "illness" that made him want to kill young women, Ted Bundy was a pretty nice guy and a valuable member of his community. That not only could have been said about Bundy, but something like it actually was said. See Ann Rule, The Stranger Beside Me 33–34 (2000) (describing how the author worked beside Bundy at a crisis clinic with a suicide prevention line, where Bundy served the community well: "If, as many people believe today, Ted Bundy took lives, he also saved lives. I know he did, because I was there when he did."). The district court's reasoning is also like saying that but for his taste for human flesh and how he satisfied it, Jeffrey Dahmer was not so bad. See Lionel Dahmer, A Father's Story 47 (1994) (describing how Jeffrey Dahmer had helped rescue a baby bird that had fallen from the nest and had nursed it back to health).

By the simple expedient of assuming away or putting out of mind all the criminal acts that they have committed, one may describe many, if not most, criminals as good people without "any other sort of criminal conduct or conduct representing poor character." Irey did not merely slip up and commit one criminal act. He persistently flew halfway around the world on a regular basis for four or five years and "many many times" raped, sodomized, and sexually tortured helpless children. And he recorded his sexual abuse and debasement of the little children in photographs and videos for his own personal enjoyment and to share with others. No one who commits such heinous crimes has good character regardless of whether the criminal, while he was not raping, sodomizing, and torturing helpless children, was a good father, or husband, or member of his local community (as distinguished from the world community). It was unreasonable and a clear error in judgment to vary downward for Irey on the theory that he has good character. See Martin, 455 F.3d at 1239–40 (disapproving the sentencing court's emphasis on the defendant's lack of a criminal record and the aberrational nature of his crimes, which the guidelines had already taken into account, and pointing out that his criminal conduct spanned a period of years and caused much harm).

The Fourth Circuit had a somewhat similar situation before it in United States v. Abu Ali, 528 F.3d 210, 258–59 (4th Cir. 2008), where the sentencing court in a case involving attempted terrorism had varied downward from a guidelines range sentence of life to a sentence of 30 years after considering, among other things, the many letters it

had received "describing Abu Ali's 'general decent reputation as a young man' and his overall 'good character.'" Id. at 268. Vacating the 30-year sentence as unreasonably lenient, the Fourth Circuit was "unmoved" by those letters, explaining:

> What person of "decent reputation" seeks to assassinate leaders of countries? What person of "good character" aims to destroy thousands of fellow human beings who are innocent of any transgressions against him? This is not good character as we understand it, and to allow letters of this sort to provide the basis for such a substantial variance would be to deprive "good character" of all its content.

Id. Likewise here. What person of good character commits the horrific crimes that Irey did against at least fifty different children and on "many many" occasions over a four-or five-year period, stopping only when he is finally caught? What the Fourth Circuit said applies as well to this case and what Irey did: "This is not good character as we understand it." If Irey is a person of good character, the term has no meaning worth mentioning.

The facts about Irey as a husband, father, and member of the community are not disputed, the question is how to weigh them for sentencing purposes. The uncontroverted facts are that as a husband Irey had been cheating on his wife with prostitutes for the past 15 years, which was three-fifths of the 25 years they had been married. See Pugh, 515 F.3d at 1192–93 (considering beyond the sentence findings "these additional salient facts that

were elicited, and uncontroverted, at the sentencing hearings"); see also Gall, 552 U.S. at 51, 128 S. Ct. at 597 (the appellate court "will, of course, take into account the totality of the circumstances"). He did it on a weekly basis while he was in Orlando, his hometown. Because of Irey's immoral conduct, he contracted a venereal disease and passed it on to his wife. He lied to his wife. As a result of Irey's depraved criminal misconduct his family lost their expensive house, their savings, and their second-generation family business. Irey admitted that because he had spent so much time over the years pursuing sex outside marriage, he spent less time with his children than he should have: "I was cheating my children out of things like taking them to the parks or a basketball game, because I had to go pick up a prostitute." In view of those uncontroverted facts, no significant weight can be given to Irey's having been "a good husband and father for his wife and children."

Irey lied not just to his wife but to others as well. As he put it, "I would lie to people even when I did not need to." He stole from the family business, which his father had started a half century before. His criminal conduct put the long-established company out of business, costing fifty members of the community their jobs. No number of civic club memberships can outweigh the harm that Irey caused his wife and family and the community.

It was, however, appropriate for the district court to find and consider that "Irey obviously has a very loving family" and "deserves whatever credit he should take for having produced these people" who spoke on his behalf at the sentence hearing. That is true even though the extremes Irey's family

members went to in expressing their affection for and devotion to him seem detached from the reality of the circumstances in which they were called upon to do it. It is incongruous at best to describe the man who had sexually tortured so many little children as "loving," a "hero," a "star," and as one who taught others "so much about life and love," and who "had a way of touching people's lives." Still, we are sympathetic, as the district court was, to the terrible emotional plight that Irey's family was in because of his crimes. It is admirable that they chose to stand by him, but in deciding how that weighs in the sentencing calculus their statements have to be considered in context.

It may well be, as the government suggests, that some of the good things Irey's family members had to say about him are a testament to his ability to lead a double life and to evade detection even by those closest to him. Their praise of Irey may prove that he knew how to keep his family and friends in the dark about his "terrible dark side," as he described it to the district court.[29] Still, it was not unreasonable for the district court to conclude that Irey has a "very loving family" and "deserves whatever credit he should take for having produced these people." We would find grossly unreasonable, however, any suggestion that the credit Irey may be due for his family's feeling for him could even remotely approach the heavy weight stacked against

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[29] We know from Dr. Shaw's report that, at least at the time of one of Irey's psychological evaluations, his wife was unaware of the severity of his crimes. Dr. Shaw also testified that "I assume that people are going to minimize and leave some of the worst things out."

him for the criminal acts he committed.

d. Age

The district court also considered "[a]nother aspect of defendant's character" to be Irey's age and weighed in his favor the fact that with "even the minimum sentence here he's going to be an old man . . . when he gets out of prison." Irey was 43 or 44 years old when he started sexually abusing children, and he was 50 when he was sentenced. With the sentence the district court imposed, minus time off for good behavior under § 3624, Irey would be 65 years old when released. With the maximum sentence of 30 years, minus time off for good behavior, Irey would be 76 years old when released. 18 U.S.C. § 3624; 28 C.F.R. §§ 523.20, 541.13 (2005); see also Barber v. Thomas, 130 S.Ct. 2499 (2010).[30]

We fail to see how those facts show that Irey is different from any other person who commits horrendous crimes in middle age and faces a long prison sentence. Cf. United States v. Seljan, 547 F.3d 993, 997–98 (9th Cir. 2008) (en banc) (87 year-old defendant sentenced to 20 years for sexually abusing children); United States v. Zastrow, 534

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[30] Judge Tjoflat's separate opinion takes the position that in performing our sentencing review we should not consider any statute, such as 18 U.S.C. § 3624, unless it was cited by or in the district court. See Separate Op. of Tjoflat, J., at 223 n.93, 224–25, 227. That is an odd position for that opinion to take since the opinion itself cites and discusses § 3624 in connection with sentencing "honesty." Id. at 153 n.13. We will not blind ourselves to the law, give a less than honest accounting of it, and ignore a relevant statute merely because it was not discussed in the district court.

F.3d 854, 855 (8th Cir. 2008) (73-year-old man sentenced to 20 years for enticing or coercing an 8-year-old girl into sexually explicit conduct which he photographed). Besides, if Irey had not successfully evaded detection for four or five years he would be that much younger when he gets out of prison. In these circumstances rewarding Irey for being older rewards him for evading detection and it is unreasonable to do that.

2. Section 3553(a)(2)(A)

The second factor that a district court must consider in sentencing, and that a court of appeals must consider in reviewing the sentence for substantive reasonableness, is "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). This requirement extends beyond, but also overlaps to some extent with, the "nature and circumstances of the offense" component of §3553(a)(1).

The § 3553(a)(2)(A) consideration is the "just deserts" concept, which carries the need for retribution, the need to make the punishment fit the crime, and the need not just to punish but to punish justly. In Pugh we quoted from the Senate Report regarding this provision:

> This purpose—essentially the "just deserts" concept—should be reflected clearly in all sentences; it is another way of saying that the sentence should reflect the gravity of the defendant's conduct. From the public's

> standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing a recurrence of the offense. From the defendant's standpoint the sentence should not be unreasonably harsh under all the circumstances of the case and should not differ substantially from the sentence given to another similarly situated defendant convicted of a similar offense under similar circumstances.

515 F.3d at 1195 (quoting S. Rep. No. 98-225, at 75–76, 1984 U.S.C.CA.N. 3258–59); see also United States v. Lychock, 578 F.3d 214, 220 (3d Cir. 2009); United States v. White Face, 383 F.3d 733, 740 (8th Cir. 2004); United States v. Beasley, 12 F.3d 280, 283 (1st Cir. 1993).

Because the punishment should fit the crime, the more serious the criminal conduct is the greater the need for retribution and the longer the sentence should be. The seriousness of a crime varies directly with the harm it causes or threatens. It follows that the greater the harm the more serious the crime, and the longer the sentence should be for the punishment to fit the crime. As we have stated before, "[c]hild sex crimes are among the most egregious and despicable of societal and criminal offenses." United States v. Sarras, 575 F.3d 1191, 1220 (11th Cir. 2009) (affirming as reasonable a 100-year sentence for a first offender who sexually abused a single 13-year-old girl and took photos of it). And Irey's criminal conduct, as we stated at the beginning, is virtually unparalleled in a "most

egregious and despicable" field of crime. This circuit has seen few, if any, other criminals who have over such a long time span raped, sodomized, and tortured so many children, some of whom were very young, and all of whom were among the most helpless people in the world. Irey, a 200-pound man, subjected his helpless young victims not just to sexual intercourse but also to anal and oral sodomy and to sexual torture that went far beyond the heartland of depravity even for child molesters. Irey treated his child victims as objects, as his toys, which he bought and then did with as he pleased. He smiled as they cried out in pain. As if that were not enough, Irey also photographed and video recorded his debauchery and distributed it on the internet, thereby guaranteeing that the record of it would outlast him and all of us, inspiring other child molesters to commit crimes against children.

Much has been said to describe and emphasize the grave harm that sexual abuse of children inflicts on its victims. Some of the best and most recent descriptions of that harm can be found in Kennedy v. Louisiana, — U.S. —, 128 S. Ct. 2641 (2008). Although the Court by a 5 to 4 margin decided that capital punishment could not constitutionally be imposed for the rape of a child, all nine justices agreed that sexual abuse of children inflicts enormous harm on the victims. The majority acknowledged that:

> Here the victim's fright, the sense of betrayal, and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but

> on her childhood. . . . Rape has a permanent psychological, emotional, and sometimes physical impact on the child. We cannot dismiss the years of long anguish that must be endured by the victim of child rape.

Id. at 2658 (citations omitted).

The four dissenting justices in Kennedy believed that child rape was such a serious crime that death could be imposed as punishment for it. Id. at 2677–78 (Alito J., joined by Roberts, C.J., Scalia, and Thomas, JJ., dissenting). They stressed the devastating, long-term effect that rape has on children. See id. at 2677 ("The immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped. Long-term studies show that sexual abuse is grossly intrusive in the lives of children and is harmful to their normal psychological, emotional and sexual development in ways which no just or humane society can tolerate." (citations and quotation marks omitted)). All nine justices agreed about that, and so do we.

Even before the Kennedy opinions, the Supreme Court had long recognized that childhood sexual abuse has devastating and long-lasting effects on its victims. See New York v. Ferber, 458 U.S. 747, 758 n.9, 102 S. Ct. 3348, 3355 n.9 (1982) ("It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults." (citing Schoettle, Child Exploitation: A Study of Child

Pornography, 19 J. Am. Acad. Child Psychiatry 289, 296 (1980))). The damage to children who are the victims of sexual abuse is not limited to psychological and emotional injury; serious physical injuries often result as well. See, e.g., Kennedy, 128 S. Ct. at 2646; State v. Goodwin, 679 P.2d 231, 232 (Mont. 1984) (seven-year-old victim suffered "a severe laceration in the vaginal area extending all the way to the cervix. Major surgery was required to repair the vaginal laceration."); id. at 234 (doctor testified that "[i]t was also too early to know whether normal sexual intercourse or childbearing would be possible" for the victim later in life); see also United States v. Eagle, 515 F.3d 794, 799 (8th Cir. 2008) ("After the assaults, [the 8-year-old victim] experienced mental, emotional, and physical problems. For instance, he began feeling sad and unhappy and also experienced encopresis, or involuntary defecation." (footnote omitted)). In this regard, it is worth remembering that Irey proudly imbedded in all capitals on one of the images he produced that: "Big Cock Push Bug Deep Into 9 Yo Girl, She Hurt in Pane."

When child pornography is produced in conjunction with the sexual abuse of children, as it was here, the harm to the child victims is magnified and perpetuated. See Ferber, 458 U.S. at 759, 102 S. Ct. at 3355 (stating that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation"); Pugh, 515 F.3d at 1197–98 & n.12 (citing extensive congressional findings about the harm caused by child pornography and recognizing that "[i]n light of these detailed legislative findings and numerous legislative enactments, we cannot

help but underscore the seriousness of this crime"); see also Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 (2006) (codified at 18 U.S.C. § 2251 note) ("Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.").

There is another aspect of the compounding harm that the production and distribution of child pornography inflicts. It may incite or encourage others to sexually abuse children. Indeed, the district court found in this case that child pornography did have that effect on at least some pedophiles, causing them to sexually abuse children who otherwise would not have been abused. See supra at 31. The district court, however, seems to have ignored what its own finding means to the calculus of harm that Irey caused. He is, after all, the producer and distributor of one of the most graphic, depraved, and widely distributed series of child pornography on the internet, the infamous "pink wall series." So widely distributed is it that over a hundred law enforcement agencies had turned up child pornography from the series in their investigations. If child pornography is a cause of child sexual abuse, as Dr. Shaw testified and the district court found, then Irey not only sexually abused fifty or more little girls in Cambodia but he also multiplied the harm he did by inciting others to sexually abuse countless more children all over the world. The district court did not even mention that harm-multiplier aspect of Irey's crime in its findings.

To be sure, the district court did describe the crime as "horrific," the victims as "numerous," and

"perhaps the most vulnerable of the world's society," and it did state that it was "an offense that rises to the very top in terms of its seriousness and its effect on other human beings" who "may never, never overcome their abuse." The court also, in an incredible understatement, said that "the characteristics of the offense, the seriousness of it itself, the long-standing, long-term engagement in it certainly does not mitigate in favor of any leniency" (emphasis added). But the court then proceeded to show leniency anyway, in this worst of the worst crimes, by varying downward from the guidelines range by 12½ years to a sentence of 17½ years, which is only 2½ years above the statutory minimum. See Irey, 563 F.3d at 1227 (Hill, J., concurring) (noting how far the sentence was from the maximum and how close to the minimum).

The 17 ½-year sentence, if all of it were to be served, would amount to only 4 months and a week for each of the 50 distinguishable victims that Irey raped, sodomized, or sexually tortured. In light of 18 U.S.C. § 3624, Irey will likely serve only 15 years and 3 months of his sentence, which works out to less than four months for each of those 50 victims who can be distinguished from each other in the images that show some of Irey's crimes. And that calculation does not include any time for Irey's additional criminal behavior of producing and distributing the massive amount of extremely graphic child pornography. Four months per child raped, sodomized, or tortured is grossly unreasonable. In sentencing there should be no quantity discount for the sexual abuse of children. Cf. Crisp, 454 F.3d at 1291 ("The court gave Crisp five hours for a crime that caused $484,137.38 in

harm. That equates to $96,827.48 per hour or $1,613.79 per minute served in custody. The sentence does not reflect the seriousness of the crime, promote respect for the law, and provide just punishment for the offense, as § 3553(a)(2)(A) requires, nor does it afford adequate deterrence to criminal conduct, as § 3553(a)(2)(B) requires.").

There is another way to guage the reasonableness of Irey's sentence: by comparing what he did and the time he received above the statutory minimum to the minimum conduct required to violate the statute and receive the minimum sentence. This is an aspect of the "just deserts" concept. The less it takes to have the statutory minimum sentence imposed, the higher the sentence should be for someone who does much, much worse than the minimum amount of criminal behavior that would violate the statute. Irey was convicted of violating 18 U.S.C. § 2251(c), which prohibits using or enticing "any minor" to engage in, or assist any other person to engage in, "any sexually explicit conduct" outside the United States for the purpose of producing any visual depiction of that conduct. "Minor" is defined as any person under 18 years of age. 18 U.S.C. § 2256(1). A person who traveled to another country and took a single photograph of a 17-year-old engaging in an obscene pose by herself would be guilty of violating the same statute and be subject to a mandatory minimum sentence of 15 years in prison. See id. § 2256(2)(A)(v) ("sexually explicit conduct" defined to include "lascivious exhibition of the genitals or pubic area of any person"). That means Irey, for all of his years of sexual violation, torture, and humiliation of at least 50 children, received only 30 months more than if all

he had done was on a single occasion snap a single photo of a single, teenage child in an obscene pose by herself. That cannot be reasonable.[31]

We realize that 17 ½ years, even when reduced to 15 ¼ years to serve is, as the panel stated, "a substantial portion of a human life—and no serious person should regard it as a trifle." Irey, 563 F.3d at 1226. We do not regard it as a trifle, but we are required to review all challenged sentences for substantive reasonableness. See Gall, 552 U.S. at 41, 128 S. Ct. at 591 ("[C]ourts of appeal must review all sentences—whether inside, just outside, or significantly outside the Guidelines range."). And sentences even longer than 17 ½ years have been held to be unreasonably short in view of all the facts and circumstances including, of course, the crime. See Ressam, 593 F.3d at 1130–31 (a 22-year sentence); Abu Ali, 528 F.3d at 262 (a 30-year sentence). Irey, after all, sentenced the children he raped, sodomized, and sexually tortured to a lifetime of harm, and the egregious child pornography he created and distributed will, because he uploaded it to the internet, continue causing harm for far longer than 17 ½ years. Irey's pink wall series will last longer than his own lifetime or ours, inciting and encouraging the sexual abuse of multitudes of children yet unborn.

The district court did impose a lifetime of supervised release on Irey once he leaves prison, as the guidelines recommend for every offender who

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[31] It is also worth noting that if Irey had sexually abused a single one of his 50 victims in this country, he would have received a mandatory minimum 30-year sentence. See 18 U.S.C. § 2241(c).

sexually abused children. See U.S.S.G. § 5D1.2(b). While it is true that someone on supervised release is not entirely free, it is equally true that he is not confined in a prison either. As the Supreme Court has held, "[s]upervised release, in contrast to probation, is not a punishment in lieu of incarceration." United States v. Granderson, 511 U.S. 39, 50, 114 S. Ct. 1259, 1266 (1994). And "a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court." United States v. Goad, 44 F.3d 580, 585 n.13 (7th Cir. 1995). If being on supervised release were the punitive equivalent of being in prison, if it served the just deserts function as well, there would be no need to put most criminals in prison; we could put them on supervised release instead. If the punitive impact of the two were the same, convicted criminals would not ask for a longer term of supervised release in hopes of getting a shorter term of imprisonment. Yet they do. Irey's attorney, for example, pleaded with the district court not to impose the 30-year guidelines range sentence but instead to set the sentence at "between 15 and 20 years with up to [a] lifetime of supervised release." Irey clearly views supervised release as being significantly less punitive than imprisonment. And it is. The same is true of the other restrictions the district court imposed, all of which are required or strongly recommended for all convicted sex offenders, such as participation in a substance abuse program and a mental health program specializing in sex offender treatment, compliance with any state sex offender registration law, being subject to search based upon

reasonable suspicion, and "the standard terms concerning risk control." Those release terms may be inconvenient, annoying, and burdensome, but they are not the equivalent of being behind bars. If they were, no convicted sex offender would care whether he remained in prison or was released subject to those conditions.

In imposing a sentence below the advisory guidelines range, the district court unreasonably failed to give enough weight to "the nature and circumstances of the offense," 18 U.S.C. § 3553(a)(1), and to the need for the sentence imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," id. § 3553(a)(2)(A).

3. Section 3553(a)(2)(B)

The third factor that a district court must consider in sentencing, and that a court of appeals must consider in reviewing the sentence for substantive reasonableness, is "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct." Id. § 3553(a)(2)(B). The sentencing judge in this case referred to this important sentencing purpose as one of the § 3553(a) factors that "essentially are subjective in nature." He did say that "a serious sentence is hopefully going to deter others from conducting similar affairs," but then expressed his view that "when we're dealing with an illness like this, I'm not sure that that rationally follows." Even though the judge said that "nevertheless, deterrence is an appropriate consideration," it is apparent that his idiosyncratic doubts about whether pedophiles could be deterred

from committing crimes involving the sexual abuse of children and child pornography affected the weight he gave to this important § 3553(a) factor.

The sentencing judge's skepticism about deterring these types of crimes is not shared by Congress, the Sentencing Commission, the Supreme Court, this Court, or other courts of appeals. See, e.g., Ferber, 458 U.S. at 760, 102 S. Ct. at 3356 ("The most expeditious if not the only practical method of law enforcement may be to dry up the market for [child pornography] by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."); Osborne v. Ohio, 495 U.S. 103, 109–10, 110 S. Ct. 1691, 1696 (1990) ("It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.").

Far from questioning the value of deterrence, in Pugh we held that the deterrence objective of sentencing is "particularly compelling in the child pornography context." 515 F.3d at 1194. We explained that imposing a lighter sentence on one convicted of a child pornography offense "tends to undermine the purpose of general deterrence, and in turn, tends to increase (in some palpable if unmeasurable way) the child pornography market." Id. The problem of a missed opportunity for deterrence, we observed, is compounded when the crime involves not just possession but also distribution of child pornography. Id. Other circuits agree. E.g., United States v. Goff, 501 F.3d 250, 261 (3d Cir. 2007) ("[D]eterring the production of child pornography and protecting the children who are victimized by it are factors that should have been

given significant weight at sentencing . . . ."); United States v. Barevich, 445 F.3d 956, 959 (7th Cir. 2006) ("Transporting and receiving child pornography increases market demand. The greater concern under the Guidelines is for the welfare of these exploited children. The avenue Congress has chosen to weaken the child pornography industry is to punish those who traffic in it.").

United States v. Lychock, 578 F.3d 214 (3d Cir. 2009), involved a defendant who had been convicted of possessing child pornography. The guidelines range was 30 to 37 months but the district court varied down to a sentence of probation and a fine. Id. at 216. That district court, like this one in this case, acknowledged that the crime "is a serious offense," but characterized the defendant as otherwise "law abiding" and was impressed with his "supportive family," and the fact that he had sought psychological help (after he was caught) and was benefitting from it. Id. (quotation marks omitted). The district court in Lychock, like the one in this case, was skeptical about whether pedophiles could be deterred. The court there remarked:

> The only benefit I could see [to imprisonment would be] as a deterrent to others, and that is a factor. . . . So other people would recognize that they cannot subscribe to these images with impunity. I am not persuaded that a jail term for this defendant warrants, or is to be equated with that value. The kind of psychological problem in persons who are drawn to this kind of material it seems to me is not going to be deterred by a jail term for an internet porno observer.

Id. at 217. The Third Circuit rejected that reasoning and held the sentence substantively unreasonable. Id. at 220–21.

As the Third Circuit noted, the district court's downplaying of deterrence where pedophiles are concerned reflects "a policy disagreement with the Guidelines recommendations, [and] such a disagreement is permissible only if a District Court provides 'sufficiently compelling' reasons to justify it." Id. at 219–20 (citing Gall, 552 U.S. at 50, 128 S. Ct. at 597, and Kimbrough, 552 U.S. at 109, 128 S. Ct. at 575). And "[t]he conclusory statement of personal belief provided in this case does not suffice." Lychock, 578 F.3d at 220. The same is true here.[32]

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[32] In Pugh, we rejected the notion that Kimbrough-style policy disagreement could justify the district court's decision to impose a probation-only sentence in a child pornography case where the minimum guidelines sentence was 97 months. 515 F.3d at 1201 n.15. We concluded that the guidelines sentences for child pornography crimes, which reflect judgments by both Congress and the Sentencing Commission as to the seriousness of the offense and the risk of recidivism, "do not exhibit the deficiencies the Supreme Court identified [in the crack cocaine guidelines] in Kimbrough." Id. We do not rule out the possibility that a sentencing court could ever make a reasoned case for disagreeing with the policy judgments behind the child pornography guidelines. We hold simply that in this case (involving production of child pornography), as in Pugh (involving possession of child pornography), the district court did not come close to doing so.

The defendant in United States v. Goldberg, 491 F.3d 668 (7th Cir. 2007), had been convicted of possessing child pornography and the guidelines range was 63 to 78 months. Id. at 669. The district court varied downward to impose only a nominal prison sentence to be followed by a decade of supervised release. Id. at 669–70. The Seventh Circuit reversed the sentence as substantively unreasonable because the district judge, among other things, had based the sentence on her "idiosyncratic penological views," id. at 673, and had "neglected considerations of deterrence and desert," id. at 674. The court explained why deterrence was so important in crimes involving the sexual abuse of children, including child pornography crimes:

> Young children were raped in order to enable the production of the pornography that the defendant both downloaded and uploaded— both consumed himself and disseminated to others. The greater the customer demand for child pornography, the more that will be produced. Sentences influence behavior, or so at least Congress thought when in 18 U.S.C. § 3553(a) it made deterrence a statutory sentencing factor. The logic of deterrence suggests that the lighter the punishment for downloading and uploading child pornography, the greater the customer demand for it and so the more will be produced.

Id. at 672. We would add that in this case not only were young children raped in the course of producing child pornography, but Irey is the one who actually

did the raping.

The more serious the crime and the greater the defendant's role in it, the more important it is to send a strong and clear message that will deter others. In sentencing Irey the district court should not have under-weighed the § 3553(a)(2)(B) adequate deterrence factor based on a conclusory statement of its personal subjective views (what the Seventh Circuit would call "idiosyncratic penological views") questioning the value of deterrence in crimes involving the sexual abuse of children. Kimbrough allows a district court to vary from the guidelines based solely on its judgment that the policies behind the guidelines are wrong. See 552 U.S. at 109, 128 S. Ct. at 575. When a district court does so, however, "closer review" of its reasoning is warranted. Id. Exercising that review, we conclude that the district court made a clear error of judgment in downplaying the importance of deterring this type of crime.

4. Section 3553(a)(2)(C)

The fourth factor that a district court must consider in sentencing, and that a court of appeals must consider in reviewing the sentence for substantive reasonableness, is "the need for the sentence imposed . . . to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C). This is the specific deterrence or incapacitation factor.

Dr. Berlin, the defense psychiatrist, did not rate the risk of Irey committing more crimes against children as low or high, but instead gave his opinion that if Irey was "shown mercy and given the opportunity, he will be able to re-enter society as a

safe and productive citizen." Dr. Shaw's report was more descriptive of the risk. It revealed that under one method of assessing risk, the Static-99 method, Irey's score placed him in "the Medium-Low risk category for sexually re-offending." According to Dr. Shaw, the research study he relied on indicated that people with Irey's score had recidivism rates of 12%, 14%, and 19% after five, ten, and fifteen years. The Shaw report did add that: "[t]he authors of the instrument, in reviewing development samples, found that few individuals recidivated beyond the age of sixty. Though this finding has mixed research support, in general as males age their sexual interest wanes." Irey's score on another instrument used to assess the risk of recidivism, the Minnesota Sex Offender Screening Tool-Revised, placed him in "the Moderate Risk Range." The Shaw report concluded that all of the risk assessment factors "suggest a moderate to low moderate risk of a new charge," which could "be reduced through continued treatment and informed supervision upon his release."

At one point during the sentence hearing Dr. Shaw testified that Irey was "essentially in the medium low to medium or moderate risk categories, which is— which is below a threshold of likely." At a later point, he testified that "overall, I find him to be, as I said, a moderate risk, a low-moderate risk, low in psychopathy." He immediately added that Irey "does have—has deviant interests." In discussing whether the risk that Irey would sexually abuse children in the future could be reduced by using testosterone-reducing drugs, Dr. Shaw testified that they "come with a number of side-effects," that "they're not always useful," and that when and if

Irey is released "he's going to have experienced a reduction naturally in testosterone and a reduction in sex drive." Dr. Shaw did not say that through any combination of factors and circumstances Irey would have a negligible risk of committing more crimes against children.

The district court credited the opinions of the two experts, which it re-characterized as Irey having "a low risk of recidivism." But then the court added: "Of course, all of that is somewhat academic because by the time he gets out of prison, he'll be most likely at an age where recidivism would be unlikely, just from a physiological standpoint."

At the completion of the sentence that the district court imposed on him, with the § 3624 reductions considered, Irey would be 65 years old. There is no support in the record for a finding that a 65-year-old male with what Dr. Shaw called "deviant interests," who has a record of not just raping and abusing children but also of sexually torturing them, is too old to do it again, thereby rendering concern about recidivism "academic." That is not what Dr. Shaw said about the aging process. He said, when talking about whether he would advise drug therapy for Irey when he was released, that as they age men are "going to have experienced a reduction naturally in testosterone and a reduction in sex drive." That is different from saying that pedophiles in their sixties lose interest in sexually abusing children or are physically incapable of doing so. No one testified that the risk of recidivism is "academic" for a pedophile in his sixties or seventies, probably because that simply is not true.

One need look no further than the facts in published opinions to see that. For example, United

States v. Seljan, 547 F.3d 993 (9th Cir. 2008) (en banc), involved a man in his mid-80s who was arrested on his way to the Philippines to "sexually educate" some children by engaging in sexual relations with them. Id. at 997–98. He had been to the Philippines 43 times during the previous 11 years, when he was between the ages of approximately 74 and 85, in order to have sex with children there. See id. He told agents after he was arrested that he had been "sexually educating" children ages 8 to 13 for about 20 years, which means that he started when he was around 65 years old. See id. at 998. He had bragged about doing it and had a scrapbook and video collection of child pornography. Id. at 997. Even though he was 87 years old at the time of sentencing the district court imposed a 20-year sentence on him. Id. The Ninth Circuit rejected his attack on the sentence as unreasonable even though it was tantamount to a life sentence. Id. at 1007; see also Zastrow, 534 F.3d at 855–57 (affirming conviction and 20-year sentence of a 73-year-old man who enticed or coerced an 8-year-old girl into sexually explicit conduct which he photographed); United States v. MacEwan, 445 F.3d 237, 240 (3d Cir. 2006) (defendant had repeatedly violated federal laws prohibiting the possession, distribution, and receipt of child pornography when he was between the ages of approximately 66 and 70); Weiler v. Purkett, 104 F.3d 149, 152 (8th Cir. 1997) (plaintiff, a state prison inmate, had sodomized and sexually abused a female child for 3 years, beginning when the girl was 7 and the defendant was approximately 70). The facts of those cases show that the risk of a male sex offender sexually abusing children after he reaches the age of

65 is anything but "academic."

Studies and reports in this field are consistent with what judicial decisions show: pedophiles who have sexually abused children are a threat to continue doing so, and age does not remove the threat. See Mark Motivans & Tracey Kyckelhahn, Federal Prosecution of Child Sex Exploitation Offenders 2006, Bureau Just. Stat. Bull., Dec. 2007, at 1, 5 tbl.6 (reporting that 7.3% of offenders arrested for sexual exploitation of children, including sex abuse, child pornography, and sex transportation, are over the age of 60); see also Hall & Hall, supra, at 457–58 ("The course of pedophilia is usually long term. In a study that examined the relationship between age and types of sexual crimes, Dickey et al found that up to 44% of pedophiles in their sample of 168 sex offenders were in the older adult age range (age 40-70 years). When compared with rapists and sexual sadists, pedophiles comprise 60% of all older offenders, indicating that pedophiles offend in their later years at a greater rate than other sexual offenders." (footnotes omitted)). Moreover, as the government points out, the photos and videos show that some of the worst of Irey's acts do not require sexual potency. All of this is consistent with Dr. Shaw's testimony that: "You can't be cured" of pedophilia, and "Cures, you can forget about it."

This Court has stated that the threat of recidivism by a pedophile who has sexually abused a child is "appalling." Pugh, 515 F.3d at 1201 ("As Congress has found and as we have discussed, child sex offenders have appalling rates of recidivism and their crimes are under-reported."); see also United States v. Allison, 447 F.3d 402, 405–06 (5th Cir.

2006) ("Congress explicitly recognized the high rate of recidivism in convicted sex offenders, especially child sex offenders."). The Supreme Court has also noted "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class," and has found that "[t]he risk of recidivism posed by sex offenders is frightening and high." Smith v. Doe, 538 U.S. 84, 103, 123 S. Ct. 1140, 1153 (2003) (quotation marks omitted). The Supreme Court has gone even further, finding that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." McKune v. Lile, 536 U.S. 24, 33, 122 S. Ct. 2017, 2024 (2002).[33]

Nor does the fact that Irey will be subject to restrictions and supervised release when he gets out of prison offer any guarantee that he will not commit any crimes. In 2003 alone, for example, 12.8% of all federal offenders on supervised release committed new crimes. Bureau of Justice Statistics, Dep't of Justice, Federal Criminal Justice Trends, 2003, at 37

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[33] Judge Tjoflat's separate opinion argues that we should not consider any of the decisions of the Supreme Court and this Court about the high recidivism rate of pedophiles and the special need for deterrence when punishing sexual crimes against children. Separate Op. of Tjoflat, J., at 225. The reason it gives for wanting us to pretend that those decisions do not exist is that they were not cited in the district court. Id. No member of this Court, certainly not the author of that opinion, has ever before suggested that in determining the law we ought to confine ourselves to the decisions that were cited in the district court. We, like all courts, have a duty to find and apply the correct law.

tbl.29 (2006). Sex offenders often fail to complete their treatment programs. See Loretta J. Stalans, Adult Sex Offenders on Community Supervision: A Review of Recent Assessment Strategies and Treatment, 31 Crim. Just. & Behav. 564, 573 (2004) ("Sex offenders have high rates of either dropping out or being expelled from treatment. Termination rates in the United States outpatient treatment programs have ranged from one quarter to more than one half of adult sex offenders . . . ."). Supervised release is revoked for 37.7% of the sex offenders who, like Irey, have a high school diploma but not a college degree. James L. Johnson, Sex Offenders on Federal Community Supervision: Factors that Influence Revocation, Fed. Probation, June 2006, at 18, 19. And the experience of states which have had sex offenders on supervised release, such as probation or parole, shows that it often fails to prevent sex offender recidivism. See Patrick A. Langan et al., Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994, at 14 (2003) ("Of the 4,163 sex offenders rearrested for a new [state] crime, nearly 9 in 10 (87%) were on parole when taken into custody . . . .").

Those studies are informative, but even without them we know that supervised release is no guarantee that a criminal will not commit more crimes when he gets out of prison. Courts of appeals regularly see cases in which serious crimes were committed by those on supervised release. See, e.g., United States v. Wilk, 572 F.3d 1229, 1232 (11th Cir. 2009) (possession of child pornography); United States v. Williams, 322 Fed. App'x 846, 846 (11th Cir. 2009) (unpublished) (aggravated child molestation and enticing a child for indecent

purposes);[34] United States v. Horsfall, 552 F.3d 1275, 1278 (11th Cir. 2008) (viewing child pornography); United States v. Trobee, 551 F.3d 835, 836 (8th Cir. 2009) (possession of child pornography); United States v. Azure, 539 F.3d 904, 905–06 (8th Cir. 2008) (robbery); United States v. Defoor, 535 F.3d 763, 763–64 (8th Cir. 2008) (aggravated assault); United States v. Eirby, 515 F.3d 31, 34 (1st Cir. 2008) (sexual abuse of a minor); United States v. Ralph, 480 F.3d 888, 888–89 (8th Cir. 2007) (child molestation); United States v. Spraglin, 418 F.3d 479, 480 (5th Cir. 2005) (murder); United States v. Martin, 382 F.3d 840, 841 (8th Cir. 2004) (rape); United States v. Marshall, 371 F.3d 42, 44 (2d Cir. 2004) (robbery; see also McNaught v. United States, 646 F. Supp. 2d 372, 380 (S.D.N.Y. 2009) (arson).

Part of the problem may be understaffing and the resulting high case loads of those who have the responsibility of doing the supervising. For example, as of September 30, 2009, there were 14,987 people under post-conviction supervision in the federal probation system in this circuit alone, with 12,216 of them on supervised release. Admin. Office of the

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[34] Unpublished opinions are not precedential, see 11th Cir. R. 36-2, and we do not cite Williams for any legal holding or point of law discussed in that opinion. Instead, we cite it solely as a source of facts about the crime committed while the defendant was on supervised release. See 11th Cir. R. 36-2, IOP 7 ("The court may cite to them . . . to establish the . . . facts of the case.").

By contrast, Judge Tjoflat's separate opinion cites as "precedent" on a point of law two unpublished opinions, Separate Op. of Tjoflat, J., at 219, which under our rules and our precedent cannot be precedent. See 11th Cir. R. 36-2; see also United States ex rel. Atkins v. McInteer, 470 F.3d 1350, 1358 n.15 (11th Cir. 2006) (Tjoflat, J.).

United States Courts, 2009 Annual Report of the Director: Judicial Business of the United States Courts, tbl. E-2 (forthcoming spring 2010). And that does not count all of those on pre-trial supervision or the thousands of presentence investigation reports that the federal officers in this circuit have to complete each year. The nationwide situation was summed up by Dr. Berlin (the same one who evaluated Irey for purposes of this case), when he testified before Congress that: "Many of these parole and probation people are stretched very thin. I think we want to be able to have them have smaller case loads." Protecting Our Nation's Children from Sexual Predators and Violent Criminals: What Needs to Be Done?, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. 30 (2005) (statement of Fred S. Berlin, M.D., Associate Professor, Johns Hopkins University).

Regardless of why so many convicted criminal on supervised release, including sex offenders, commit new crimes, the fact is that they do. Supervised release is better than unsupervised release, but it does not offer society the level of protection from a convicted criminal that incarceration does. Despite that undeniable fact, the district court found that Irey, one of the worst sex offenders ever prosecuted in this circuit, had a low risk of recidivism, or would pose a low risk when released at the end of the reduced sentence it imposed on him.

The government, however, has never attacked that factfinding as clearly erroneous. Instead, it has insisted throughout this appeal that it is not challenging any of the factfindings. As a result, for

purposes of this appeal we will assume that at the end of a 17 ½-year sentence—15 years and 3 months after it was imposed—Irey would present a low risk of recidivism.[35]

That does not mean, however, that the sentence the district court imposed will adequately "protect the public from further crimes of the defendant," as § 3553(a)(2)(C) requires. A low risk is not the same as no risk. Adequate protection is a function of two variables: the level of risk that conduct will occur and the level of harm that will be inflicted if that conduct does occur. See United States v. Boyd, 475 F.3d 875, 877–78 (7th Cir. 2007) (upholding a sentencing determination that the defendant's acts created a substantial risk of bodily injury to another person in part because "[d]angerousness is a function of the magnitude of the harm that will occur if danger materializes and the probability that it will materialize"). With child sexual abuse of the kind that we know Irey is capable of and has committed, the harm is enormous and permanent. It can literally destroy lives. Accordingly, even with an assumed low risk of

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[35] This is another part of our opinion that Judge Tjoflat in his separate opinion has misread. His opinion operates under the erroneous assumption that we have rejected the district court's finding that when Irey is released from the sentence it imposed on him and goes on supervised release he will pose a low risk of recidivism. See Separate Op. of Tjoflat, J., at 225–27. Although we have pointed out for the benefit of sentencing courts in the future the reasons and decisions indicating that the district court's finding is wrong, because the government has not challenged the factfinding we have expressly accepted the low risk of recidivism finding for purposes of reviewing this sentence.

recidivism following release in 15 years and 3 months, imprisonment for that length of time does not afford adequate protection from further crimes by him. The district court imposed not one extra month over the statutory minimum for the purpose of protecting society and its children from further crimes by Irey, stating: "I don't think society needs further protection from him, at least beyond the statutory minimum sentence." Given the magnitude of the harm that will occur if Irey does commit more sexual crimes against children, that was a clear error in judgment.

5. Section 3553(a)(4) & (5)

District courts in sentencing, and courts of appeals in reviewing sentences, must also consider the guidelines range and any pertinent policy statements in the guidelines. 18 U.S.C. § 3553(a)(4)-(5).[36] Of course, since Booker the guidelines have been advisory, but they are still to be given respectful consideration. We have not attempted to specify any particular weight that should be given to the guidelines range and will not do so now. Our best discussion of the subject came in United States v. Hunt, 459 F.3d 1180 (11th Cir. 2006), where we

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[36] Section 3553(a)(2)(D) requires consideration of the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," and § 3553(a)(3) requires consideration of "the kinds of sentences available." No one suggests that either of those two considerations is relevant to this appeal. Nor has anyone mentioned the § 3553(a)(7) factor, "the need to provide restitution to any victims of the offense."

rejected "any across-the-board prescription regarding the appropriate deference to give the Guidelines." Id. at 1184. We decided instead that, subject to review for reasonableness, sentencing courts may "determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant's sentence." Id. at 1185. In doing so, we recognized that "Booker restored to district courts a measure of discretion that the mandatory Guidelines had removed," id. at 1184, but we added this important caveat: "This discretion is bounded, of course, by Congress's mandate to consider the factors in section 3553(a), one of which, subsection four, is the Sentencing Guidelines." Id.

We stressed in Hunt that consideration of the advisory guidelines range is important, because the guidelines "are an indispensable tool in helping courts achieve Congress's mandate to consider 'the need to avoid unwarranted sentence disparities' among similarly situated defendants," id., which is required by 18 U.S.C. § 3553(a)(6). Even though not bound by the guidelines, a sentencing court may not give them so little consideration that it amounts to "not giv[ing] any real weight to the Guidelines range in imposing the sentence." Pugh, 515 F.3d at 1200; see also Booker, 543 U.S. at 264, 125 S. Ct. at 767 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."). See generally Kimbrough, 552 U.S. at 107, 128 S. Ct. at 573–74 ("[I]t is unquestioned that uniformity remains an important goal of sentencing. As we explained in

Booker, however, advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help 'to avoid excessive sentencing disparities.'"); Rita, 551 U.S. at 348, 127 S. Ct. at 2463 ("The upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale."). In this case, the advisory guidelines range calculated out at life imprisonment and was lowered to thirty years only because that is the statutory maximum based on the way the crime was charged. See supra at 12. In view of all of the facts and circumstances of this case, and given the weakness of the district court's explanation for deviating from the guidelines range, it effectively gave the guidelines range no real weight in imposing the sentence.

In addition to requiring consideration of the guidelines range, the Sentencing Reform Act also requires that district courts consider any pertinent policy statement issued by the Sentencing Commission. 18 U.S.C. § 3553(a)(5). The policy statements in the guidelines that are relevant to this case address when departures are appropriate in calculating the sentencing range. We are not dealing with a guidelines departure decision here, but a § 3553(a) variance decision. Still, even though the policy statements are in no way binding, § 3553(a)(5) requires that they be considered in making decisions about variances. All of the policy statements point in one direction in this case and that is away from a below-the-guidelines sentence.

The guidelines state as a matter of policy that

age "is not ordinarily relevant in determining whether a departure is warranted," at least not unless "the defendant is elderly and infirm." U.S.S.G. § 5H1.1. In the present case the district court expressly considered Irey's age at sentencing (50 years) in his favor, even though he was not elderly or infirm.

The guidelines state as a matter of policy that "civic, charitable, or public service . . . and similar prior good works are not ordinarily relevant in determining whether a departure is warranted." Id. § 5H1.11. Yet one of the reasons the district court gave for varying downward was Irey's civic work—that he had been "a good person to his community." The guidelines also advise, as a matter of policy, that aberrant behavior may be used to support a downward departure only if, among other things, "the defendant committed a single criminal occurrence or single criminal transaction" that was "without significant planning" and "was of limited duration." Id. § 5K2.20(b). This case does not fit any of those requirements, yet the district court used what amounted to an aberrant behavior theory as part of the justification for its downward variance, stating: "I think other than the acts of Mr. Irey, there's no indication that he has engaged in any other sort of criminal conduct or conduct representing poor character."[37]

The guidelines state as a matter of policy that "[m]ental and emotional conditions are not

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[37] The district court either overlooked the fact that Irey, a married man, had patronized prostitutes on a weekly basis for 15 years, or it thought that doing so does not "represent[ ] poor character."

ordinarily relevant in determining whether a departure is warranted," except in circumstances not present here. Id. § 5H1.3. Yet in deciding to vary downward, the district court placed significant weight on Irey having what it characterized as the "illness" of pedophilia. To the extent that the district court relied on its belief that because he was a pedophile Irey had diminished capacity to resist raping children, or that his criminal behavior was due in substantial part to pedophilia, another policy statement is relevant. The guidelines state that a court should not depart downward based on diminished capacity where "the offense involved actual violence or a serious threat of violence," or where the defendant has been convicted of an offense under Chapter 110 of Title 18, which Irey was. Id. § 5K2.13.

There are also guideline policy statements advising that an upward departure would be appropriate in this case. While Irey's criminal conduct was so extreme that the guideline calculations maxed out at life even without any upward departures, § 3553(a)(2)(5) still expressly requires that those policy statements be considered. As the Presentence Report in this case noted, the comment to § 2G2.1 advises that "[a]n upward departure may be warranted if the offense involved more than 10 minors." Id. § 2G2.1 cmt. n.6.[38] Irey's

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[38] The cited comment to § 2G2.1 of the guidelines is technically not a policy statement, but the guidelines provide that it is to be treated as one. See U.S.S.G. § 1B1.7 ("Such commentary is to be treated as the legal equivalent of a policy statement."); see also United States v. Smith, 568 F.3d 923, 927 n.1 (11th Cir. 2009) ("The commentary and application notes of the Sentencing Guidelines are

criminal conduct involved at least five times more than 10 minors, yet the district court varied downward. The guideline policy statements also call for an upward departure "[i]f the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim." Id. § 5K2.8. Everyone agrees that what Irey did fits within that description, yet the district court varied downward.

While not binding on the district court, the policy statements in the guidelines, which it was required by the Sentencing Reform Act to consider, all advise against a sentence below the guidelines range. The district court effectively ignored them all.[39]

6. Section 3553(a)(6)

Section 3553(a) requires that district courts in sentencing, and courts of appeals in reviewing sentences, "consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). This factor is a particularly important one when reviewing the substantive reasonableness of a sentence because one of the primary purposes of appellate review of sentences is to iron out differences in order to avoid

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authoritative, unless they are plainly erroneous, inconsistent with the regulation they interpret, or contrary to the Constitution or federal law.").

[39] With one exception. The district court did impose a lifetime term of supervised release, as the policy statement in U.S.S.G. § 5D1.2(b) advises for all cases where the defendant was convicted of a sex offense against a minor.

undue disparity. Booker, 543 U.S. at 264, 125 S. Ct. at 767.

It is difficult to find a case involving sexual abuse of children that compares to this one. The number of Irey's victims (at least 50), the very young age (four, five, and six years old) of some of them, the extreme nature of the abuse and torture that he inflicted on them, the number of years it went on (four or five), and the massive amount of graphic child pornography that he single-handedly produced and distributed (at least 1,200 photographs or videos showing Irey himself sexually abusing the children) combine to make his criminal behavior the worst of the worst. Yet, the district court gave Irey a major downward variance, resulting in a sentence just above the statutory minimum and more than a decade below the guidelines range. That sentence is seriously out of line with sentences imposed on other defendants whose criminal behavior, while atrocious in some cases, was not as extreme as Irey's or did not involve as many victims. See, e.g., United States v. Frank, 599 F.3d 1221 (11th Cir. 2010) (40-year sentence for defendant who had twice traveled to Cambodia, where he paid three girls who were between the ages of approximately 11 and 15 to engage in sexual acts with him and to take sexually explicit pictures of those acts); United States v. Culver, 598 F.3d 740 (11th Cir. 2010) (60-year sentence for defendant who fell within criminal history category II, had used tranquilizers and a stun gun to render his 13-year-old stepdaughter unconscious, and had produce a pornographic videotape and four pictures depicting the unconscious girl); United States v. Huskey, 349 Fed. App'x 495 (11th Cir. 2009) (70-year sentence for

defendant, who (like Irey) fell within criminal history category I, who engaged in anal, oral, and vaginal sex with his daughter and penetrated her vagina with objects, while she was between the ages of 6 and 9, recorded the abuse in photographs and on videotapes, and traded images of the abuse over the internet for other child pornography);[40] Sarras, 575 F.3d 1191 (100-year sentence for the defendant, who fell within criminal history category I, who engaged in oral and vaginal sex with his 13-year-old step-daughter approximately 23 times during a 4-month period and photographed it on three of those occasions);[41] United States v. Kapordelis, 569 F.3d 1291 (11th Cir. 2009) (35-year sentence for the defendant, who fell within criminal history category I, who over a span of at least 20 years: drugged two boys, aged 11 and 14, on three occasions before photographing their genitalia; traveled abroad, where he molested and took digital videos and pictures of three minors, some of whom he had drugged, and engaged in oral and anal sex with at least one 17-year-old; solicited sex from male prostitutes under the age of 18 while in foreign countries; drugged his 16-year-old second cousin and then videotaped himself having sex with the minor; and possessed approximately 10,580 images and 400

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[40] We include a number of unpublished opinions in this list, citing each one not for any holding but solely for the facts about the crime and the sentence imposed by the district court. See supra at 120 n.34.

[41] The defendant in Sarras was sentenced in the same courthouse the same year as Irey but by a different district court judge.

videos of child pornography, some of which featured victims he had personally molested); United States v. Wilcox, 324 Fed. App'x 805 (11th Cir. 2009) (45-year sentence for the defendant, a 50-year-old diabetic with no prior criminal history, who took and posted on the internet pornographic photographs of himself touching an 11-year-old girl, attempted to gain commercially from the photographs, and possessed approximately 120 child pornography images, including a sadistic picture of a 5-year-old girl wearing a dog collar while being vaginally penetrated by an unidentified male); United States v. Harris, 291 Fed. App'x 300 (11th Cir. 2008) (30-year sentence for defendant, who fell within criminal history category I, who filmed and photographed seven 15-and 16-year-old boys, two of whom were his godchildren, engaging in sexual acts with each other in his bedroom, shared videos and photographs depicting those occurrences with others, and on one occasion invited his friend over to watch two underage males engage in sexual activities and then filmed as his friend had sex with one of them); United States v. Carter, 292 Fed. App'x 16 (11th Cir. 2008) (45-year sentence for the defendant, with no specified criminal history, who possessed approximately 4,800 image, text and movie filed depicting or describing the sexual exploitation, including bondage, of at least eleven different young girls, ages 7 to 14; some of those files were produced and distributed by the defendant himself and depicted him touching the genitalia of two young girls); United States v. Oliver, 281 Fed. App'x 898 (11th Cir. 2008) (130-year sentence for the defendant, with no criminal record that was mentioned, who produced images of himself

molesting a single victim, his 6-year-old granddaughter, and distributed those images over the internet); United States v. Hodnett, 210 Fed. App'x 949 (11th Cir. 2006) (30-year sentence for the defendant, who fell within criminal history category I, who possessed at least 600 images of child pornography, some of which depicted prepubescent minors engaged in sexual activity, traded images of child pornography over the internet, and had in the past engaged in the following sexual activities with minors: kidnaping and raping a 6-year-old Vietnamese girl in 1969 while serving in Vietnam; molesting and engaging in sexual intercourse with his two stepdaughters in the 1970s; and engaging in oral sex with a 6-year-old girl in 2004); United States v. Foster, 209 Fed. App'x 942 (11th Cir. 2006) (life imprisonment for the defendant who fell within criminal history category I, and who during a 4year period engaged in oral and vaginal sex with a single victim who was less than 12 years old when the abuse began); United States v. Johnson, 451 F.3d 1239 (11th Cir. 2006) (140-year sentence for the defendant, who had two prior convictions for lewd acts in front of minors, who sexually abused and photographed three boys between the ages of 8 and 16 over an approximately 6 year period, produced at least 150 pornographic images of the victims, transmitted an unknown number of those images over the internet, and either possessed or transmitted at least 24 videos of children engaging in sexually explicit conduct); United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002) (105-year sentence for the defendant, who fell within criminal history category I, and who traveled to third world countries during a period of 20 years and enticed at least eight

boys, between 8 and 17 years old, to engage in sex with him, encouraged them to engage in sex with a fellow pedophile, convinced one Honduran family to allow their minor son to live with him illegally in the United States, and possessed at least 120 images of child pornography).

While the criminal conduct of all the defendants in the cited cases ranges from serious to truly depraved, none of it is worse than Irey's criminal conduct, yet he received a sentence far more lenient than they did. The lesser sentence the district court imposed on Irey by means of a major downward variance creates a substantial disparity. The disparity arises not because the defendants in the cited cases were denied a downward variance the should have received and were sentenced too harshly, but because Irey was given a downward variance he should not have received and was sentenced too leniently. The unreasonableness is not in the sentences imposed in the cited cases but in the sentence imposed in this case.[42]

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[42] Judge Barkett's dissenting opinion argues that we cannot assess whether Irey is similarly situated to any defendant convicted of sexually abusing children "without the benefit of the entirety of the sentencing records of all [those] defendants." Dissenting Op. of Barkett, J., at 254–55 n.1. The statutory command is to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). That information can be discerned from the appellate opinion in most cases, including those that we have cited. See also Kimbrough, 552 U.S. at 108, 128 S. Ct. at 574 (holding that the statute requires consideration of sentences of other courts in order to comply with § 3553(a)(6)'s instruction that the need to avoid unwarranted sentencing disparities be taken into

7. What "It Comes Down To"

The district court suggested that these factors weighed in Irey's favor: he was 50 years old; his family still loved him; when he was not consorting with prostitutes in this country or raping, sodomizing, and torturing little girls in Cambodia, he was not such a bad guy; the "illness" of pedophilia rendered his criminal acts "not purely volitional"; and he was a victim of child pornography on the internet. The court discounted the value of general deterrence for sexual crimes against children. It thought that Irey would present a low risk of recidivism once released and, as a result, no time above the statutory minimum was needed to protect society from him. The result the court reached created an unwarranted sentence disparity among defendants who have committed comparable or less egregious offenses involving the sexual abuse of children. Along the way to its final sentencing decision the district court, as we have explained, committed a number of subsidiary errors in judgment, but even if we disregard all of them there remains one overriding clear error in judgment that renders the downward variance sentence substantively unreasonable.

After discussing the other factors, the district

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account). Any requirement that the record in other cases be scoured before the sentences in those cases can be considered would render it impossible to comply with the statute, and we will not interpret the statute in a way that effectively renders it a nullity, see, e.g., Hibbs v. Winn, 542 U.S. 88, 101, 124 S. Ct. 2276, 2286 (2004), and ignores what the Supreme Court has said about it.

court said: "It comes down to my view of what promotes respect for the law and provides just punishment." The district court was right about the importance of the § 3553(a)(2)(A) factor, which requires consideration of the need for the sentence imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." But the court was wrong, it committed a clear error in judgment, in deciding that those purposes could be served by a major downward variance to a point closer to the statutory minimum sentence than it is to the guidelines range. The district court's leap from the advisory guidelines sentence of 30 years down to a just-above-minimum sentence of 17 ½ years does not reflect the seriousness of and provide just punishment for Irey's rape, sodomy, and sexual torture of at least fifty children, acts that he committed "many many times" over a four-or five-year period, and his production and distribution of one of the worst series of child pornography on the internet. Nor does it promote respect for the law.

For all of the reasons we have explained, no downward variance from the guidelines range is reasonable in this case. Nothing less than the advisory guidelines sentence of 30 years, which is the maximum available, will serve the sentencing purposes set out in § 3553(a). We are left with the definite and firm conviction that it was substantively unreasonable, a clear error in judgment, an abuse of discretion, for the district court to conclude to the contrary. Were we to hold otherwise, "we would come perilously close to holding that appellate review is limited to procedural irregularity," and that the Supreme Court has "eviscerated appellate review at

the same time that it has mandated the appellate courts to continue to review sentences for reasonableness." Pugh, 515 F.3d at 1203–04. That paradoxical holding would throw us back a quarter of a century into the pre-Sentencing Reform Act era, with its "non-system in which every judge is a law unto himself or herself," Frankel, Jail Sentence Reform, at E21, an era that is gone for good.

In reaching this conclusion, we are not, as Judge Tjoflat asserts, usurping the district court's sentencing role.[43] Separrate Op. of Tjoflat, J., at 215-17. Instead, we are performing our sentence review role. Again, the Supreme Court has instructed us that "district judges at times make mistakes that are substantive" and "impose sentences that are unreasonable," and we "exist to correct such mistakes when they occur." Rita, 551 U.S. at 354, 127 S. Ct. at 2466–67. In the course of reviewing this sentence, we have determined that, given the extreme facts in the case, a downward deviation from the guidelines range is not substantively reasonable. We have made that decision after studying the record of the sentence proceedings, which is complete; considering the district court's findings and explanation, which are adequate for the purpose; granting the district

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[43] Nor are we, as Judge Tjoflat's opinion charges, taking a step toward creating, through judicial decisions, a system of mandatory sentencing ranges "that is identical in all relevant respects to [the pre-Booker] mandatory-Guidelines sentencing range[s]." Separate Op. of Tjoflat, J., at 229 n.98. We are simply doing our duty, as prescribed in Rita, to review the substantive reasonableness of the sentence imposed in this case.

court's decision the full measure of deference that it is due; and considering all of the arguments of the parties for and against the reasonableness of the sentence. That is what appellate courts are supposed to do.[44]

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[44] Judge Tjoflat's separate opinion goes to great lengths to accuse us of addressing arguments that were not raised and preserved in the district court. See Separate Op. of Tjoflat, J., at 215–16, 221–27. Much of that opinion's analysis is based on the faulty premise that the government made only a "simple objection" that Irey's sentence is "unreasonable." Id. at 216. As we have already explained, however, the government has been arguing for a 30-year sentence ever since it filed the sentencing memorandum in the district court. See supra at 13–14. That memorandum emphasized the sheer magnitude and utter depravity of Irey's criminal conduct and urged the court to respect Congress' findings that "departures should be extremely rare in child sex crime cases" because of the seriousness of those crimes. The government specifically argued that a variance would not be justified even if Irey's risk of recidivism was low, his capacity was diminished, his behavior was aberrant, his family ties and responsibilities were significant, and his decisions were clouded by his pedophilia. Indeed, the government said that "any variance under 18 U.S.C. § 3553(a) would be unreasonable because there is nothing unusual about the nature or circumstances of this offense or the defendant's personal characteristics." The government argued in its sentencing memorandum that "[i]f this case is atypical, it is because of aggravating, not mitigating, factors." And it took the same position at the sentence hearing. See supra at 27–30.

The government's objection that Irey's sentence was substantively unreasonable was sufficient to preserve the specific grounds for the objection that it had already raised in its sentencing memorandum and in its arguments during the sentence proceeding. Especially given the context of the sentence proceedings, the government did not need to regurgitate its arguments in favor of a 30-year sentence

after the court had pronounced the sentence; it is enough that the government objected to the downward variance sentence as unreasonable. See United States v. Maurice, 69 F.3d 1553, 1557 (11th Cir. 1995) (holding that a general objection after the sentence was announced is sufficient to preserve supporting arguments made before it was announced where the reasons for the objection are clear); see also United States v. Candelario, 240 F.3d 1300, 1304–05 (11th Cir. 2001) (Tjoflat, J.) (citing, with approval, a circuit court decision "reviewing the defendant's sentence under preserved error review where the defendant argued in his sentencing memorandum that the amount of drugs for which he was to be sentenced had to be pleaded in the indictment and found by the jury beyond a reasonable doubt" (emphasis added) (quotation marks omitted)); see also United States v. Bartlett, 567 F.3d 901, 910 (7th Cir. 2009); United States v. Guthrie, 557 F.3d 243, 255 (6th Cir. 2009); United States v. Curry, 461 F.3d 452, 459 (4th Cir. 2006) (concluding that the government, "by vigorously arguing for a sentence within the Guidelines range throughout the sentencing hearing," had preserved its objection to the sentence even though it did not object at the end of the sentencing colloquy); United States v. Shumard, 120 F.3d 339, 340 (2d Cir. 1997).

We have specifically recognized that so long as the government raises "the crux of its objection to the district court's sentence," it is not required to articulate all the details of its position. United States v. Smith, 39 F.3d 1143, 1146 (11th Cir. 1994); see also United States v. Livesay, 484 F.3d 1324, 1327–29 & 1330 n.7 (11th Cir. 2007) (concluding that the government's objection to the extent of the downward departure also preserved an objection "to the reasonableness of the overall sentence"), vacated on other grounds, 552 U.S. 1092, 128 S. Ct. 872 (2008); United States v. Arevalo-Juarez, 464 F.3d 1246, 1249–50 (11th Cir. 2006) (stating that even though the district court did not grant a departure the government's argument that a departure was unwarranted was enough to preserve the issue of whether the sentence was otherwise unreasonable); see also United

This is one of those unusual cases where the top and bottom of the guidelines range are the same; both are 30 years. There can be no upward variance because the statutory maximum is also 30 years. As a result, our holding that no downward variance is reasonable under the totality of the facts and circumstances of this case means that on remand the

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States v. Carlson, 498 F.3d 761, 763 & n.2 (8th Cir. 2007); United States v. Pineiro, 470 F.3d 200, 204–05 (5th Cir. 2006) ("We have never required a party to express its objection in minute detail or ultra-precise terms.").

On a similar point, Judge Tjoflat's opinion accuses us of implicitly overruling United States v. Jones, 899 F.2d 1097 (11th Cir. 1990), overruled on other grounds by United States v. Morrill, 984 F.2d 1136 (11th Cir. 1993) (en banc), by allowing an unexplained objection that a sentence is "substantively unreasonable" to trigger the equivalent of a new sentencing hearing on appeal. See Separate Op. of Tjoflat, J., at 221–22 & n.90. Our decision, however, is consistent with Jones and its progeny. In United States v. Weir, 51 F.3d 1031 (11th Cir. 1995), we explained that "[i]f the relevant objection is raised after the presentation of the [pre-sentence investigation] report, . . . but before the actual imposition of the sentence, Jones is satisfied." Id. at 1033. Specifically, in Weir, we held that Jones was satisfied because "[t]he district court clearly understood the Government's position and specifically rejected it." Id. Similarly, we held in Maurice that the rationales behind Jones "are served so long as the objection to be preserved and the grounds for the objection are clear to the sentencing court at the conclusion of the hearing." 69 F.3d at 1557. As a result, "a party is not required to reargue a general objection made after sentencing if the argument in support of that objection has previously been presented to the sentencing court and the reasons for the objection remain clear after the sentence is pronounced." Id. The government did enough to preserve all of the arguments in favor of a 30-year sentence here.

sentence must be 30 years.[45] There is no other sentence left. When we vacate a district court's judgment and remand, we routinely include in the bottom line of our decision that we are sending the case back for "proceedings consistent with this opinion." Because we have determined that a downward deviation from the guidelines range in this case is unreasonable, it follows that the only action on remand that will be consistent with this opinion is resentencing within the guidelines range, which necessarily means a sentence of 30 years.[46]

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[45] Judge Tjoflat's separate opinion points out that in none of the other cases where we have vacated a sentence as unreasonable have we directed the district court to enter a particular sentence. Separate Op. of Tjoflat, J., at 227–28 & n.96. That is true, but in none of those four other cases did we have both extreme facts and circumstances rendering any downward variance unreasonable and a pinpoint guidelines range—one where the bottom and top were the same sentence. Because this is an unprecedented situation, it adds nothing to label our decision an "unprecedented step." Id. at 227. Whatever we do in a situation that has never been before us is, by definition, an unprecedented step one way or the other.

[46] Having determined that no downward variance is reasonable, it would be senseless to remand with instructions that permit the district court to downwardly vary and resentence below the guidelines range again. If the district court on remand resentenced Irey to 20 years, we would have to vacate that sentence and send the case back. If the court then tried out a sentence of 22.5 years, we would have to vacate that sentence and send the case back again. And so on, back and forth the case would go in a pointless ping pong game. To borrow Judge Tjoflat's hyperbolic language, such proceedings would "gobble[ ] up judicial resources" that could be better spent elsewhere. Separate Op. of Tjoflat, J., at 236. Doing as he suggests would prevent the first appeal from a sentence from being

V. CONCLUSION

Because of the substantial deference district courts are due in sentencing, we give their decisions about what is reasonable wide berth and almost always let them pass. There is a difference, though, between recognizing that another usually has the right of way and abandoning one's post. We will not quit the post that we have been ordered to hold in sentencing review and the responsibility that goes with it. The Supreme Court has instructed us that "[i]n sentencing, as in other areas, district judges at times make mistakes that are substantive," and that it is our duty "to correct such mistakes when they occur." Rita, 551 U.S. at 354, 127 S. Ct. at 2466-67.S. Ct. at 2466–67.

In this case the district court made a substantive mistake, a clear error in judgment, by unreasonably varying downward from the advisory guidelines sentence when no sentence less than it is sufficient to fulfill the purposes set forth in the Sentencing Reform Act. To do our duty to correct that mistake, we vacate the sentence the district court imposed and remand with instructions that the defendant is to be resentenced within the guidelines range.

VACATED AND REMANDED.

"the main event" for determining whether a sentence is substantively reasonable and would instead send "the unmistakable message that [the first appeal of a sentence] is nothing but a tryout on the road." Id. at 231. That would be, to use his term, "shocking." Id. at 216.

HILL, Circuit Judge, concurring:

I concur in the opinion for the court and in the judgment reversing and remanding with instructions.

I do so in spite of the fact that I originally concurred in the now vacated panel opinion, United States v. Irey, 563 F.3d 1223(11th Cir.), vacated, 579 F.3d 1207 (11th Cir. 2009).

I should explain.

That original concurrence was based entirely on my perception of the extent of discretion due the trial judge. The sentence was not the right one, in my opinion, but I stretched discretion to cover it. I tend, properly I think, to be reluctant to limit the discretion of a trial judge who is closer to a case than its record can bring me.

Since our panel opinion was vacated, I have persisted in putting one question to counsel and colleagues: "If this case does not demand the maximum sentence authorized by Congress for violation of 18 U.S.C. § 2251(c), what case would?" No one has persuaded me that any is likely to be encountered.

That case, more aggravated than this, remained elusive.

After oral argument and the court's conference, I finally realized that I had been putting a question that has no answer because it is predicated upon the wrong assumption. It asks that this case be assumed not to demand the maximum sentence. But I now realize that the elusive maximum sentence case, which I sought, was right here before me.

This case is the case demanding the maximum

sentence.

Therefore, the sentence imposed, remarkably reduced from what the Congress authorized, does abuse discretion. And if it does, then I would abdicate my duty should I vote to leave it intact.

So I vote to reverse.

TJOFLAT, Circuit Judge, specially concurring in part and dissenting in part:

I concur with the court's judgment that Irey's sentence must be vacated but dissent as to the instruction that the district court sentence Irey to 30 years' imprisonment. I write separately because in reaching this result, the court asks the wrong question and gives the wrong answer. Today's decision cements this circuit's approach to one of the most difficult questions posed by United States v. Booker, 543 U.S. 404, 125 S. Ct. 738 (2005): what is the proper role of the courts of appeals now that the once mandatory Guidelines are only advisory?

The court asks whether Irey's sentence achieves the purposes of 18 U.S.C. § 3553(a). After conducting its own § 3553(a) analysis, the court answers "no," then proceeds to decide what would be an appropriate sentence: 30 years' imprisonment. It orders the district court to impose this sentence on remand. It does so on the basis of new evidence and arguments that the Government never presented to the district court. In short, we have assumed the role of resentencer.

Resentencing defendants on appeal does immense harm to this court's institutional relationship with the district courts by transforming the district court's sentencing proceeding from the "main event" to a "tryout on the road." This, in turn, creates perverse incentives for the parties and the district court, misallocates judicial resources, and creates disrespect for the rule of law.

In my view, the right question for us to ask is whether the district court abused its discretion. The correct answer is "yes" because its factfindings as

best I can understand them cannot be reconciled with the sentence it imposed. The correct disposition is to vacate and remand for resentencing. With this approach, we would preserve our traditional function as an appellate court and ensure that the district court is the forum for the main event, which is required by United States v. Booker, 543 U.S. 404, 125 S. Ct. 738 (2005).

To understand the roles Booker assigned to the district court, the Sentencing Commission, and the courts of appeals, it is necessary to see the evolution of these roles over time. This opinion is therefore organized as follows: part I describes the sentencing model before and under the Sentencing Reform Act (the "SRA")[1] before Booker, part II sets out the sentencing model after Booker, part III applies abuse of discretion review to the case at bar, and part IV surveys the court's approach and resulting institutional harm. Part V concludes.

I. Pre-Booker

A. Pre-SRA

Understanding the sentencing model I apply today requires understanding the deeply rooted purposes of sentencing and their evolution in American criminal law.

> Prior to the American Revolution, colonial courts fashioned sentences with three basic purposes in mind: to punish the offender

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[1] Sentencing Reform Act of 1984, Pub. L. No. 88-473, 98 Stat. 1987 (codified, as amended, in scattered sections of 18 and 28 U.S.C.).

> for his crime, thereby satisfying society's desire for retribution ("punishment"); to deter others from committing the same crime by demonstrating its disadvantageous consequences ("general deterrence"); and to incapacitate the wrongdoer, so as to protect society from further criminal activity ("specific deterrence" or "incapacitation").

United States v. Scroggins, 880 F.2d 1204, 1206 (11th Cir. 1989). In the 1800s, penological experts became "dissatisfied with the failure of prisons to rehabilitate inmates," and rehabilitation became a fourth basic purpose of sentencing. See Arthur W. Campbell, The Law of Sentencing § 1:2 (2009). The American tradition thus embraced four purposes of sentencing—punishment, general deterrence, specific deterrence, and rehabilitation;[2] this tradition has continued to the present day.

An early model of sentencing that combined these four purposes was the "medical model," so named because penological experts believed that proper measures taken during imprisonment could "cure" offenders, allowing them to reenter society as productive members. Accordingly, rehabilitation received more weight than the other three purposes of sentencing under the medical model. Under the medical model, sentencing responsibilities were divided between the district court and the Parole Board.[3] District courts imposed indeterminate

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[2] See United States v. Brown, 381 U.S. 437, 458, 85 S. Ct. 1707, 1720 (1965).

[3] The system started with the U.S. Board of Parole. It was redesignated the U.S. Parole Commission by the

sentences that were monitored by a Parole Board, meaning that a judge would impose a sentence that had a minimum term of confinement and a maximum term of confinement, but "allow[ed for] the possibility of release sometime between the expiration of those terms[, with] the date and conditions of release before the maximum term" determined by the Parole Board.[4] Campbell, supra, § 4:2.

District courts fashioned the minimum and maximum bounds of the sentence in accordance with the four traditional purposes of sentencing. They could consider all facts they thought were relevant to these purposes, "conduct[ing] an inquiry broad in scope, largely unlimited either as to the kind of information . . . or the source from which it [could] come." United States v. Tucker, 404 U.S. 443, 446, 92 S. Ct. 589, 591 (1972).[5] Because they could

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Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, § 4202, 90 Stat. 219, 219 (1976). For convenience, I refer to the Parole Commission as the Parole Board.

[4] The Parole Board "monitor[ed] the offender's rehabilitative progress. When it decide[d] that the offender [was] fully rehabilitated, the board release[d] the offender on parole. Thus, rehabilitation [was] the dominant goal of the medical model; punishment, general deterrence, and incapacitation [were] achieved only incidentally to the offender's rehabilitative incarceration." United States v. Scroggins, 880 F.2d 1204, 1207 (11th Cir. 1989). For more on the model, see id. at 1207 n.7 (detailing the variety of sentencing options available to the district court).

[5] For example, a court could consider the manner in which the offender committed the crime, which included any circumstances that aggravated or mitigated the offender's

consider a broad array of facts, they enjoyed "wide discretion in determining what sentence to impose." Id.[6]

Although the district court set the bounds of the sentence, the Parole Board was given

> discretion to determine when a prisoner ha[d] reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to life in the community. By [the district court's] keeping the minimum low, the prisoner [was] encouraged "to earn favorable consideration for parole in accord with the public policy embodied in the parole statutes."[7]

Garafola v. Benson, 505 F.2d 1212, 1217 (7th Cir. 1974) (internal citations omitted). The Parole Board

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criminal blameworthiness, because the manner was relevant to the purpose of punishment. Likewise, it could consider aspects of the defendant's background because they were relevant to specific deterrence and rehabilitation.

[6] See also Wasman v. United States, 468 U.S. 559, 563, 104 S. Ct. 3217, 3220 (1984) ("It is now well established that a judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence.").

[7] See also Morrissey v. Brewer, 408 U.S. 471, 477–478, 92 S. Ct. 2593, 2598 (1972) (explaining that the purpose of releasing offenders on parole was "to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed").

therefore determined how much of the sentence would be served beyond the minimum term. Thus, although the Parole Board could not review the parameters the district court set on the offender's sentence, it could re-sentence the offender within the parameters. Because the parameters were often wide—the district court could not accurately predict how long the offender would need for rehabilitation, the model's driving factor—the Parole Board was a powerful actor in the medical model.

The courts of appeals, on the other hand, had virtually no role under the medical model. So long as the sentence was within statutory limits, it "was, for all practical purposes, not reviewable on appeal." Koon v. United States, 518 U.S. 81, 96, 116 S. Ct. 2035, 2045 (1996).[8] Because sentences were not subject to appellate review, judges rarely explained the reasoning behind the sentences imposed, and there is little direct evidence from the pre-SRA era of how judges made sentencing decisions. Marc Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 451–52 (1992). So while a judge sentencing an offender to prison implied that imprisonment was needed for punishment, general and specific deterrence, and rehabilitation, there was little evidence of the relative weights the judge assigned to those purposes.

Therefore, prior to the SRA, district judges

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[8] Prior to the SRA, Fed. R. Crim. P. 35(a) allowed the "court to correct an illegal sentence at any time." An illegal sentence was not "within the limitations set forth in the statute under which it [was] imposed." Dorszynski v. United States, 418 U.S. 424, 431, 94 S. Ct. 3042, 3047 (1974).

had wide discretion in imposing sentences, but the Parole Board ultimately had control over how much of the sentence would be served. The courts of appeals played a very limited role.

B. SRA

By the 1970s, the medical model was falling our of favor.[9] Congress had come to reject the medical model's core premise—that prison sentences could rehabilitate offenders—as well as its unfair results. Offenders who committed the same crime served wildly different sentences because of the district courts' unfettered discretion and because the Parole Board determined how much of a sentence would actually be served.[10] See S. Rep. No. 98-225, at 38 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3221.

To address the vices of the medical model—mainly unwarranted sentencing disparity—Congress enacted the SRA, which codified the traditional purposes of sentencing as the

> need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide

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[9] See Michael Vitiello, Reconsidering Rehabilitation, 65 Tul. L. Rev. 1011, 1018–26 (1991), for an explanation of some of the critiques of the medical model in the 1970s.

[10] This was especially unfair because the length of the sentences offenders served, based on the Parole Board's release decisions, did not correlate with their likelihood to recidivate.

> just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2).[11] These factors mapped onto punishment, general deterrence, specific deterrence, and rehabilitation, respectively. Unlike under the medical model, however, rehabilitation was no longer the dominant concern; in fact, while rehabilitation could be a relevant factor in sentencing, it could not drive a prison sentence. 18 U.S.C. § 3582(a) (directing that the court, when considering a prison sentence, recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation"). Congress feared that allowing the district court to fashion a sentence based on these purposes in each individual case would perpetuate the unwarranted sentencing disparity that plagued the medical model. Congress therefore created the United States Sentencing Commission (the "Commission") and tasked it with devising sentencing guidelines that would dictate

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[11] By codifying these purposes, Congress defined the factors relevant to the traditional purposes of sentencing in ways that sometimes differed from the common law. Whereas punishment historically was driven by retribution, see Scroggins, 880 F.2d at 1206, 18 U.S.C. § 3553(a)(2)(A) defined it as encompassing the above considerations.

offenders' sentences.

The new model had three main goals: (1) honesty, (2) fairness, and (3) proportionality. See United States Sentencing Commission, Guidelines Manual, § 1A1.1(3) (Nov. 1, 2009) (hereinafter "U.S.S.G."); United States v. Booker, 543 U.S. 220, 264, 125 S. Ct. 738, 767 (2005).[12] To achieve honesty, Congress abolished parole and replaced indeterminate with determinate sentencing. Judges sentenced offenders to fixed terms and offenders served the full prison sentence imposed.[13] To

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[12] Because, prior to the SRA, the sentence the judge imposed was not the sentence the offender served, neither the public nor the offender perceived the judge's sentence as "honest." See Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 Hofstra L. Rev. 1, 4 (1988); see also U.S.S.G. Ch.1, Pt.A, intr. comment. Furthermore, because of "the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders," sentences were not "fair." U.S.S.G. Ch.1, Pt.A, intr. comment. Lastly, because the system did not "impose[] appropriately different sentences for criminal conduct of differing severity," sentences were not "proportional." Id.

[13] An offender could still serve less than the full sentence, however, if awarded credit for satisfactory behavior while incarcerated. 18 U.S.C. § 3624(b) provides:

> a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary

achieve fairness, Congress severely curtailed the district court's discretion to fashion a sentence by requiring that, in typical cases, the court impose a sentence within the range identified by sentencing guidelines. To achieve proportionality, Congress replaced the theory that sentences should be imposed primarily to rehabilitate offenders with the theory that sentences should be no harsher than necessary to serve the four traditional purposes of sentencing. The Sentencing Commission's Guidelines and the courts' role in sentencing were to reflect these goals.

The rest of this subpart explains how the SRA divided the roles in sentencing between the Commission, the district courts, and the courts of appeals, respectively.

1. The Sentencing Commission's Role

The SRA charged the Commission with designing guidelines that would direct the district courts how to fashion sentences to fulfill § 3553(a)(2)'s sentencing purposes in a way that ensured honesty, proportionality, and fairness. See 28 U.S.C. § 991(b)(1); id. § 994(f). Assembled in a Guidelines manual, the Guidelines resembled a computer program. To impose a sentence, all a district judge had to do was to input information requested by the manual and the manual would generate a sentencing range.

Every sentence had an offense-and an offender-based component. United States v. Mogel,

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regulations.

Hence, offenders served the sentence imposed less good time.

956 F.2d 1555, 1558 (11th Cir. 1992); see 28 U.S.C. § 994(b) (instructing that the Commission "establish a sentencing range" for "each category of offense involving each category of defendant"). The offense-based component correlated mostly to the sentencing purposes of punishment and general deterrence; the offender-based component correlated mostly to the purposes of specific deterrence and rehabilitation. See Mogel, 956 F.2d at 1559. The district court found the sentence it was to impose by consulting a table in the Guidelines manual: the table's Y axis specified offense levels; its X axis specified categories of offenders. See U.S.S.G. § 1B1.1; id. Ch.5, Pt. A ("Sentencing Table") The table listed an appropriate sentencing range for each combination of offense level and category of offender.

a. The Offense Level

Roughly speaking, the offense level was the Guidelines' proxy for the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," as well as to "afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(2)(A)–(B). See Scroggins, 880 F.2d at 1208. As an initial matter, the Commission had to determine what type of conduct would factor into the offense level, namely

> whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that

> constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing).

U.S.S.G. § 1A1.1 (initial policy statement).[14]

It settled on a hybrid approach, devising an offense level with three components: (1) a "base offense level," (2) "specific offense characteristics," and (3) "adjustments." Scroggins, 880 F.2d at 1209–10.[15] The base offense level reflected the charged conduct. Rather than draft a guideline for each offense in the United States Code, the Guidelines grouped offenses and specified an offense level that reflected the average seriousness of the group.[16] Id.

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[14] The Commission explained the differences between a real offense and charged offense sentencing model:

> A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

U.S.S.G. § 1A1.4(a).

[15] The jury found or the guilty plea established the charged offense conduct, and the district court found the facts relevant to the specific offense characteristics or the adjustments. See infra note 24.

[16] As instructed by 28 U.S.C. § 994(b), the Commission classified each federal crime according to its severity, then placed it together with the crimes similarly

at 1209. The specific offense characteristics were tailored to each category of offense[17] and captured some of the offender's real conduct in committing the offense of conviction. The adjustments applied to all offenses regardless of their category. Some but not all of the adjustments related to the charged offense. Id. at 1209–10.[18]

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classified in a "category of offenses." Because all of the crimes in a category were of like severity, all had the same base offense level. For example, the base offense level for approximately 130 different theft offenses in the United States Code is the same, established by U.S.S.G. § 2B1.1 (Larceny, Embezzlement and Other Forms of Theft).

[17] The specific characteristics for robbery, for example, include whether property was taken from a financial institution or post office, whether and how a firearm was used, whether people were injured, whether a carjacking occurred, and the dollar value of the loss. U.S.S.G. § 2B3.1.

[18] The Commission rejected a pure charge offense system because it could have achieved only unfair uniformity: it would have treated unlike offenders alike given that the criminal code is not written to take account of the manner in which the offenses are committed. See Stephen Breyer, supra note 12 at 9–10. The Commission rejected a pure real offense system that would have considered all possible real conduct, not only selected specific offense characteristics or adjustments—because it would have been administratively unwieldy: innumerable factual permutations might have a bearing on the need for punishment and general deterrence. Id. at 10–12. The hybrid model was a compromise to avoid the primary pitfalls of both.

b. The Offender Characteristics

The category of offender was the Commission's proxy primarily of the need for the sentence "to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C); see also Mogel, 956 F.2d at 1558–59. The Commission categorized offenders almost exclusively by criminal history as determined by prior convictions.[19] See U.S.S.G. § 4A1.1; see also Mogel 956 F.2d at 1560 (noting that the "offender-based component almost entirely relies on the offender's criminal history"). The Commission settled on criminal history because it was a workable way to achieve sentencing uniformity. See Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 Hofstra L. Rev. 1, 19–20 (1988). Criminal history based on convictions could be neatly categorized and taken into account by the Guidelines matrix. The myriad other factors that might help predict recidivism were difficult to categorize and even more difficult to quantify—age, for example, might cut differently in different cases—and including them would make the sentencing table unworkable.[20] See id.

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[19] The Guidelines did allow for a departure if "reliable information indicates that the defendant's criminal history category substantially [over or] under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3.

[20] In so focusing, the Commission ignored a number of factors that Congress had suggested and the Commission had conceded were relevant to predicting recidivism. See

2. The District Court's Role

a. The Statutory Considerations

The SRA tasked the district courts with sentencing individual offenders in accordance with several statutory factors, but, at the same time, eliminated most of the district court's discretion in carrying out that task. In nearly all cases, the court's job was ministerial, to follow the Commission's instructions. The scheme played out this way.

The district courts were required to sentence pursuant to 18 U.S.C. § 3553. Section 3553(a) directed the courts to tailor their sentences to the particular circumstances of the offense and the offender consistent with what I refer to as the parsimony[21] principle: a sentence must be "sufficient, but not greater than necessary" to achieve the four traditional purposes of sentencing. (emphasis

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U.S.S.G. Ch.4, Pt.A, intr. comment (recognizing that "empirical research has shown that other factors are correlated highly with the likelihood of recidivism, e.g., age and drug abuse, [but] for policy reasons they were not included here at this time"). Other factors disregarded included education, vocational skills, employment record, and family ties and responsibilities. See 28 U.S.C. § 994(d).

[21] "Parsimony" is defined as "economy in the use of means to an end." Merriam Webster's Collegiate Dictionary 846 (10th ed. 1999). In this context, parsimony translates to using the least harsh sentence (the means) needed to satisfy the traditional purposes of sentencing (the end). Although the court quibbles with the label "parsimony principle," it does not disagree with the underlying concept.

added).[22] Section 3353(b)(1), however, instructed that "the court shall impose a sentence of the kind, and within the range" prescribed by the Guidelines, unless "there exist[ed] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" or there was no "applicable sentencing guideline." 18 U.S.C. § 3553(b)(1). "In the absence of an applicable sentencing guideline, the court [had to] impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2)"—the four traditional purposes of sentencing. Id. The court also had to consider "sentences prescribed by guidelines applicable to similar offenses and offenders" and "the applicable policy statements of the Sentencing Commission." Id.

Because the district court was obligated to follow the Guidelines in all but the rarest cases, the district court only followed the parsimony principle to the extent that the Commission did in creating the Guidelines. Congress instructed the Commission to establish sentencing guidelines to meet the § 3553(a)(2) purposes, but did not mention the parsimony principle that appears in § 3553(a). See 28 U.S.C. § 991(b)(1)(A).[23] It is thus not clear that

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[22] In fashioning a sentence, the district courts were to take account of other factors, including: (1) the nature and circumstances of the offense and the history and characteristics of the offender, (2) the kinds of sentences available, (3) the Commission's guidelines and policy statements, (4) the need to avoid unwarranted disparity, and (5) the need to provide restitution. 18 U.S.C. § 3553(a).

[23] Compare 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary,

the Guidelines took into account the parsimony principle, and the way they operated frequently created tension with the parsimony principle.

In sum, while Congress instructed district judges to consider the § 3553(a)(2) purposes, district judges—to ensure uniformity—almost always had to impose Guidelines sentences. They only conducted an independent analysis of the 3553(a)(2) purposes and parsimony principle in the rare event that aggravating or mitigating circumstances existed or no guideline applied.

b. The Sentencing Proceeding

Under the SRA, district courts fashioned sentences using an adversary process, in which "a confrontation between the parties [occurred] similar to that which occurs at a civil bench trial." United States v. Scroggins, 880 F.2d 1204, 1209 (11th Cir. 1989). The process began with a pretrial investigation conducted by the court's probation officer and the issuance of a presentence investigation report ("PSI"). Id. at 1209 n.11. The PSI identified the guidelines applicable to the offense of conviction, recited the facts related to the base offense level, the specific offense characteristics and adjustments, determined the offense level, and,

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to comply with the purposes set forth in paragraph (2) of this subsection.") with 28 U.S.C. § 991(b) ("The purposes of the United States Sentencing Commission are to (1) establish sentencing policies and practices for the Federal criminal justice system that (A) assure the meeting of the purposes of sentencing as set forth in section [18 U.S.C. §] 3553(a)(2).").

after reciting the defendant's criminal history, determined the defendant's criminal history category. The PSI then specified the sentencing range for the offense and the kinds of sentences available. See 18 U.S.C. § 3552; Fed. R. Crim. P. 32(c)–(d); Scroggins, 880 F.2d at 1209 & n.11. After considering the parties' objections to the PSI's factual recitations and Guidelines determinations, the probation officer summarized any unresolved objections in an addendum to the PSI. Scroggins, 880 F.2d at 1209 & n.11. The PSI thus "serve[d] the purpose of a pretrial stipulation in a civil case." Id. The addendum framed the issues to be litigated at the sentencing hearing.

The sentencing hearing followed. There, the district court resolved any remaining factual and legal issues regarding the correct application of the Guidelines. See Scroggins, 880 F.2d at 1209, 1211 & n.18. Determining the circumstances of the offense and the offender's criminal history presented factual questions; the correct application of the Guidelines to those facts[24] presented mixed questions. After

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[24] Because the jury conviction or the guilty plea established the charged offense conduct (the base offense level) and the defendant's criminal history would have been established (in most cases) as a matter of record, the district judge was responsible for making findings related to specific offense characteristics and adjustments. The government bore the burden of proving by a preponderance of the evidence any specific offense characteristics and adjustments (not established via jury verdict or guilty plea) that would enhance the defendant's offense level, and any facts that would support an increase of the defendant's category of offender. The defendant bore the same burden regarding adjustments that would reduce the offense level

hearing from the parties, the district court announced and "state[d] in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). If the court imposed a within-Guidelines sentence and the Guidelines range exceeded 24 months, the court had to also state "the reasons for imposing a sentence at a particular point within the range." Id. § 3553(c)(1). In the rare event that the court imposed a sentence "not of the kind, or . . . outside the [Guidelines] range," it had to state its reasons for doing so with specificity in a written order. Id. § 3553(c)(2).

Following its imposition of the sentence, the district court had to give the parties a chance to object to its findings of fact, its Guidelines applications or other legal rulings, or the manner in which the sentence was imposed. United States v. Jones, 899 F.2d 1097, 1102 (11th Cir. 1990), overruled on other grounds by United States v. Morrill, 984 F.2d 1136 (11th Cir. 1993) (en banc). Entertaining an objection at this stage of the proceeding gave the district court an opportunity to address the objection and correct any error it may have made.[25]

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or the category of offender. United States v. Wilson, 884 F.2d 1355, 1356 (11th Cir. 1989).

[25] Allowing an objection to be made for the first time on appeal would give the objecting party an opportunity to blind side the district court's sentencing decision. The Jones objection rule precluded this and enabled the court of appeals to treat objections that could have been made but were not as waived.

The Jones "raise it or waive it" rule applied unless a party could demonstrate plain error, Jones, 899 F.2d at 1103, or the record disclosed that the district court was clearly aware of the objection in time to address it. See

3. The Court of Appeal's Role

Lastly, Congress tasked the courts of appeals with policing the system by creating substantive grounds for appeal. In addition to the right to appeal an "illegal" sentence, which had existed under the medical model, Congress created three new grounds for appeal, see 18 U.S.C. § 3742, to assure that the district court correctly applied the Guidelines. The first of these grounds was that the sentence was the result of an "incorrect application" of the Guidelines. Id. § 3742(a)(2), (b)(2).[26] The second was that the sentence was "greater" or "less" than the Guidelines sentencing range. Id. § 3742(a)(3), (b)(3).[27] The third was that the sentence was imposed for an offense for which no guideline existed and was "plainly unreasonable." Id. §

United States v. Weir, 51 F.3d 1031, 1033 (11th Cir. 1995) (declining to apply the waiver rule when the district court "clearly understood the [party's] position and specifically rejected it").

[26] A district judge's determination of where to sentence a defendant within a correctly calculated Guidelines range, however, could not be appealed. United States v. Medina, 90 F.3d 459, 465 n.8 (11th Cir. 1996) ("The district court has the discretion to impose any sentence within the guideline range.").

[27] If the district court rejected a party's request for a sentence greater or less than the Guidelines sentencing range, the sentence was unreviewable unless the court erroneously believed it lacked the authority to depart from the sentencing range. See, e.g., United States v. Rudisill, 187 F.3d 1260, 1265 (11th Cir. 1999); United States v. Fossett, 881 F.2d 976, 979–80 (11th Cir. 1989).

3742(a)(4), (b)(4).[28]

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In sum, the SRA structurally divided responsibility for sentencing among three entities: the Commission, the district courts, and the courts of appeals. The Commission promulgated the mandatory Guidelines, which were the lynchpin of the SRA. The Guidelines created sentences by considering offense and offender characteristics. In addition to a base offense level reflecting the charged offense conduct, the offense characteristics incorporated specific offense characteristics and more general adjustments, meaning that offenders were sentenced partly on the basis of uncharged conduct. The offender characteristic was based entirely on the offender's criminal history.

The district courts were statutorily charged with sentencing offenders consistent with the traditional purposes of sentencing and the parsimony principle. In nearly all cases, though, the district courts were required to impose a Guidelines sentence. Therefore, the district court rarely had to conduct an independent analysis of the four purposes driving sentencing—the Sentencing Commission had already done this work for them in devising the mandatory Guidelines. Likewise, the courts rarely had to grapple with the parsimony

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[28] When no guideline existed, the findings of fact underpinning the sentence were reviewed for clear error. See 18 U.S.C. § 3742(e). Guidelines applications were reviewed de novo. See, e.g., United States v. Auguste, 392 F.3d 1266, 1267 (11th Cir. 2004).

principle. In all, the district courts exercised very little discretion other than determining where within the applicable Guidelines range to sentence the offender. The courts of appeals' role was to ensure that the Guidelines were followed.

II. The Post-SRA Model

A. United States v. Booker

In United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), a fractured Supreme Court radically reformed and rearranged the roles the SRA had assigned the district courts, the Commission, and the courts of appeals. At issue in Booker was whether the SRA's mandatory Guidelines violated the Sixth Amendment. The Supreme Court held they did and reaffirmed that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[29] Id. at 244, 125 S.

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[29] The court defined the statutory maximum as the "'maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" United States v. Booker, 543 U.S. 220, 232, 125 S. Ct. 738, 749 (2005) (quoting Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004)). "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts [beyond those found by the jury], but the maximum he may impose without any additional findings." Blakely, 542 U.S. at 303–04, 124 S. Ct. at 2537.

Although the Guidelines range fell between the statutory minimum and maximum, the requirement that

Ct. at 756. Because the Guidelines sentencing range was often determined by the facts established by the district court by a mere preponderance of the evidence, the mandatory Guidelines violated the Sixth Amendment. Id. at 232–34, 244, 125 S. Ct. at 749–50, 756. To solve this Sixth Amendment problem, the Court discussed two possible remedies: (1) transform the Guidelines from mandatory to advisory,[30] or (2) require that every fact that would

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the judge in most cases impose a Guidelines sentence posed a constitutional problem. Prior to the SRA, the jury found beyond a reasonable doubt that the offender had committed the charged offense conduct. This finding exposed the offender to any sentence within the full statutory range. Because the jury found the charged offense conduct beyond a reasonable doubt, this sentencing model posed no constitutional problem.

Under the SRA, the jury still made findings beyond a reasonable doubt as to the charged offense conduct. If the sentencing record contained only the jury's findings regarding the charged offense conduct, the maximum sentence the offender could receive under the statute would be the sentence called for by the base offense level plus only those specific offense characteristics and adjustments supported by the jury's findings (plus any increase based on the offender's criminal history). But the SRA allowed the judge to make additional factual findings—to support specific offense characteristics and adjustments beyond those supported by the jury's findings—that would increase the offender's sentence beyond the maximum sentence he could receive based solely on the jury's findings. Thus, the SRA violated the Sixth Amendment because the judge's factual findings would permit a sentence beyond the maximum sentence that would be allowed by statute based on the facts found by the jury.

[30] The Supreme Court recognized that there would be no Sixth Amendment problem if the Guidelines "could be

determine the Guidelines range be admitted by the defendant or proved to a jury beyond a reasonable doubt. Citing administrative concerns, the Booker remedial majority[31] opted for the first choice.

Accordingly, the Supreme Court severed and excised two provisions of the SRA. First, the Court struck 18 U.S.C. § 3553(b)(1), which had mandated the imposition of a Guidelines sentence. 543 U.S. at 259, 125 S. Ct. at 764. Second, the Court struck 18 U.S.C. § 3742(e), which set out standards of appellate review, Ct. at 765. To fill the gap, the Court held that the statute "impli[ed]" that sentences should be "review[ed] for 'unreasonable[ness]'" Id. (citing 18 U.S.C. § 3742(e)(3)) (final alteration in original).[32] The Court

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read as merely advisory provisions." Booker, 543 U.S. at 233, 125 S. Ct. at 750. The SRA allowed for departure from the Guidelines in rare circumstances, but that did not render the Guidelines advisory. Id. at 234, 125 S. Ct. at 750. The clear import of this reasoning is that the Booker problem could be cured (and ultimately was cured) by transforming the Guidelines into recommendations, but the Guidelines had to be genuinely advisory. See Gall v. United States, 552 U.S. 38, 47, 128 S. Ct. 586, 595 (2007) ("We reject, however, an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range.").

[31] Two different opinions in Booker garnered a five-vote majority. The first opinion, often called the "Constitutional opinion," held that portions of the SRA violated the Sixth Amendment. The second opinion, called the "remedial opinion," remedied the Constitutional problem by excising parts of the SRA.

[32] The Court explained:

[A]s we have previously held, a statute that does not

later clarified that "review for unreasonableness" meant review for abuse of discretion. Gall, 552 U.S. at 46, 128 S. Ct. at 594. Aside from these changes, the Court left the remainder of the SRA intact, concluding that it functioned independently. Booker, 543 U.S. at 259, 125 S. Ct. at 764.

Booker redistributed the roles in sentencing offenders between the Commission, the district courts, and the courts of appeals. The Commission no longer framed the district courts' sentencing discretion with mandatory guidelines; instead, it would inform the district courts' sentencing discretion with advisory guidelines.[33] The district

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> explicitly set forth a standard of review may nonetheless do so implicitly. . . . [I]n this instance . . . the past two decades of appellate practice in cases involving departures[] imply a practical standard of review already familiar to appellate courts: review for "unreasonable[ness]."

Booker, 543 U.S. at 260–61, 125 S. Ct. at 765 (citing 18 U.S.C. § 3742(e)(3)) (final alteration in original).

[33] Except for Booker's requirement that the district courts consider the Guidelines in exercising their sentencing discretion, post-Booker sentencing resembles the sentencing the district court performed pre-Booker in imposing a sentence for an offense for which no guideline existed. When no guideline existed, the court had to "hav[e] due regard" for "the purposes set forth in [§ 3553](a)(2)[,] . . . sentences prescribed by guidelines applicable to similar offenses and offenders, and [] the applicable policy statements of the Sentencing Commission." 18 U.S.C. § 3553(b)(1). In that situation, the district court was in effect doing the Commission's work; because the court was not constrained by an offense category, it had to make an individualized sentencing determination.

courts once again bore the responsibility of independently crafting sentence. See United States v. Rodriguez, 406 F.3d 1261, 1287–89 (11th Cir. 2005) (Tjoflat, J., dissenting from the denial of rehearing en banc). Thus, § 3553(a), which embodies the parsimony principle and the four traditional purposes of sentencing, moved to the forefront, providing the bases for the construction of a sentence. The courts of appeals bore the responsibility of reviewing the district courts' sentences, but under the abuse of discretion standard of review. Such review, it was thought, would preserve some of the uniformity in sentencing the SRA sought to achieve.

Because the primary responsibility for sentencing post-Booker lies with the district courts, I explain what fashioning a sentence in accordance with § 3553(a) involves, how the sentencing hearing should be conducted, and the explanation the district courts must give for the sentences they impose. Only then can the abuse of discretion standard of appellate review be meaningfully discussed.

B. The Key Inquiry—§ 3553(a)

Section 3553(a) sets out seven factors that a district court must "consider" before imposing a sentence.[34] At the end of the day, however, the

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[34] 18 U.S.C. § 3553(a) provides:

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the

history and characteristics of the defendant;
(2) the need for the sentence imposed—
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for—
(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

statute requires the distict court to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)." 18 U.S.C. § 3553(a). Thus, although all of the sentencing factors identified in § 3553(a) must be considered, the heart of the inquiry is the district court's assessment of the four traditional purposes of sentencing § 3553(a)(2) has codified.

The first purpose, § 3553(a)(2)(A), requires the sentence be "sufficient, but not greater than necessary" to satisfy the need for punishment. Section 3553(a)(2)(A) actually involves three inquiries that exist in a dynamic relationship: the sentence must "reflect the seriousness of the offense, []promote respect for the law, and [] provide just punishment for the offense."[35] Section 3553(a)(2)(B)

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(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

[35] Seriousness of the offense is easily understood. Promoting respect for the rule of law turns on perception of the punishment; respect for the rule of the law may be compromised if the offender or community believes that an offender's punishment was too harsh or lenient based on the

focuses on the need for general deterrence – "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct." The need for general deterrence involves an assessment of the seriousness of the offense and its relative incidence in the community. Section 3553(a)(2)(C) asks what sentence is needed to "protect the public from further crimes of the defendant." The basic task is to predict the likelihood that the offender will commit further offenses, assess the potential seriousness of those offenses, and determine the need to incapacitate the offender as a prophylactic measure. Finally, § 3553(a)(2)(D) focuses on the need for the sentence to rehabilitate the offender—"to provide . . . needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." Ordinarily, rehabilitation will

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facts of the case or if it leads to unwarranted sentencing disparity. Just punishment takes into account the offender's culpability.

Evidence will be relevant to the (a)(2)(A) inquiry to the extent that it is relevant to any of these inquiries. Importantly, the first and third inquiries are specific to "the offense." Moreover, the "offense" is the offense of conviction; therefore on these inquiries, the district court cannot consider conduct that does not bear on the offense of conviction, such as uncharged or unproven conduct.

Sometimes, all three factors militate in favor of a strong need for punishment: for example, severe punishment may be just for a serious offense, and any failure to impose such punishment could engender disrespect for the rule of law. Sometimes, the factors will be in tension: although a serious offense was committed, circumstances (such as the offender's motivation) may call for less punishment, and imposing a sentence without taking account of those circumstances may engender disrespect for the rule of law.

play no role in determining the sentence. See 18 U.S.C. § 3582(a).[36]

At first blush, it seems odd that Congress required consideration of seven factors but ultimately directed the district courts to impose sentences sufficient but not greater than necessary to comply with just one: § 3553(a)(2). On further examination, however, it is apparent that all of the other factors inform the analysis of the four purposes of sentencing. Section 3553(a)(1) requires consideration of "the nature and circumstances of the offense and the history and characteristics of the defendant." These considerations are directly relevant to all four purposes. Section 3553(a)(3) requires consideration of the "kinds of sentences available," which is crucial to any determination of what sentence would be no harsher than necessary to punish or deter. Sections 3553(a)(4), (5) and (6) require consideration of the Guidelines sentencing

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[36] "[I]mprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a); see also United States v. Shortt, 485 F.3d 243, 249 (4th Cir. 2007) ("Although still relevant, the fourth purpose, rehabilitation, was recognized by Congress and the Sentencing Commission to be insufficient, standing on its own, to justify a particular sentence."). Rehabilitation is clearly relevant, however, when sentencing an offender to a term of probation or supervised release. See, e.g., S. Rep. No. 98-225, at 76 ("Rehabilitation is a particularly important consideration in formulating conditions for persons placed on probation."). All of the (a)(2) factors are relevant to determining the conditions of probation or supervised release—probation and supervised release can certainly have punitive and deterrent aspects, for example. For simplicity, though, I limit my discussion in this opinion to the imprisonment component of sentences.

range, the Commission's policy statements, and the need to avoid unwarranted disparity, respectively. Unwarranted sentencing disparity breeds disrespect for the rule of law in contravention of § 3553(a)(2)(A) (whose purpose is, in part, to "promote respect for the law"), and a correctly calculated Guidelines sentencing range (which is calculated in part by considering the Commission's policy statements) is one tool for avoiding such disparity. Finally, § 3553(a)(7)'s command that the court consider the need to provide restitution to victims is directly relevant to just punishment.

My take on what transpires after the district court considers the seven § 3553(a) factors is that the district court should impose a sentence that satisfies the four traditional sentencing purposes of § 3553(a)(2). In most, if not all cases, one of the purposes will drive the sentence. If, for example, the punishment that should be meted out is more than sufficient to meet the needs of general and specific deterrence, then the need for punishment will "drive" the sentence. If the need for general deterrence is at the forefront (say in a tax evasion case) and the defendant is a first-time offender, the sentence will be imposed to satisfy the need for general deterrence—that is, the term of imprisonment for that purpose is greater than the period of incarceration required for punishment or specific deterrence. Alternatively, consider the case of a repeat offender with a string of convictions that harmed scores of victims. The period of incarceration required to protect the public from his future criminal behavior may exceed the term of imprisonment needed for punishment and general deterrence, and specific deterrence will drive the

sentence.[37]

C. Preparing For the Sentencing Hearing

As I explain in part I.B, supra, a district judge might not find the answer to what would constitute a parsimonious sentence by consulting the Guidelines because the Commission was not instructed to take the parsimony principle into account when fashioning the Guidelines. When the parties disagree about what would be a parsimonious sentence, the PSI is of limited use to the district court. As the Supreme Court anticipated in Gall, the

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[37] I say that a sentence is often driven by one of the (a)(2) purposes because of my reading of the plain statutory language of § 3553. Given the direction that a sentence must be sufficient but not greater than necessary to comply with the 3553(a)(2) purposes, it logically follows that a sentence should not be greater than is necessary to satisfy the (a)(2) purpose that demands the longest sentence. On the other hand, weighing the (a)(2) purposes against each other does not follow logically from the statute—even if there is no need for specific deterrence, for example, the sentence must still be sufficient to satisfy the driving (a)(2) purpose. If the driving purpose is punishment, a district court cannot play the lack of a need for specific deterrence off of punishment—otherwise, the sentence would not be sufficiently long to satisfy the need for punishment.

In handing down the sentence, the district judge must explain why the driving purpose subsumes the other purposes—that is, the sentence necessary to satisfy the driving purpose is also sufficient to satisfy all of the other (a)(2) purposes. All of the (a)(2) purposes, therefore, are properly considered, and the court's characterization of the "driving purpose" as "speed[ing] ahead and flatten[ing] the other three" is inaccurate. Ante at 76 n.24. This explanation also enhances meaningful appellate review and the public perception that justice has been done.

PSI does not answer the question of which of the four § 3553(a)(2) purposes the Guidelines sentencing range primarily accommodates; nor does it recommend a sentence that would be sufficient, but not greater than necessary to achieve those purposes.[38] 552 U.S. at 49–50, 128 S. Ct. at 596. The PSI simply informs the district court of the range of sentences that, in the Commission's view, should be considered in cases with offense and offender characteristics similar to the case before the court.

The district court needs the parties' input to fashion a parsimonious sentence. The sentencing hearing is an adversary proceeding[39] in which the parties frame the controversy by requesting sentences that they believe will meet § 3553(a)'s parsimony requirement.[40] After the court has entertained the parties' evidence and arguments in support of their requests, the district court determines whether either sentence request is

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[38] The current PSI format is the same one used by the district courts' probation offices pre-Booker.

[39] Rita v. United States, 551 U.S. 338, 351, 127 S. Ct. 2456, 2465 (2007) ("[T]he sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure.").

[40] This assumes that the prosecutor and defense counsel are properly representing their respective clients, as indicated in the following text. Although they may at times agree, the prosecutor will generally argue for a harsher sentence, and defense counsel for a more lenient sentence. If the prosecutor and defense counsel are not prepared to advance their positions, the district court ought to continue the sentencing hearing and reconvene it when the parties are prepared.

supported by the § 3553(a) factors. Id.

The obligations Gall has placed on the prosecutor and defense counsel to present sentence requests to the district court is consistent with their adversarial roles in the case.[41] The prosecutor must

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[41] They assumed these obligations early in the case. The prosecutor's obligations are expressed in the Principles of Federal Prosecution ("Principles"), United States Attorneys' Manual, § 9-27.000 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html, the defense counsel's in the Sixth Amendment.

The Principles were originally promulgated by the Attorney General on July 28, 1980 and were updated to describe the prosecutor's role in the sentencing process under the Guidelines. The Principles have not been updated to reflect the changes Booker and Gall have made to the prosecutor's obligations. As the Principles indicate, the prosecutor considers sentencing when presenting the case to the grand jury for indictment. Presumably acting on the prosecutor's recommendation, the grand jury indicts the defendant for the "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction." Id. § 9-27.300 ("Selecting Charges—Charging Most Serious Offenses"). The "'most serious' offense" is "that which yields the highest range under the sentencing guidelines." Id.

If the offense initially presented to the grand jury does not fully embrace the nature and extent of the criminal conduct involved, the prosecutor should recommend that the grand jury's indictment include charges that would do so. The prosecutor should seek additional charges when they

1. Are necessary to ensure that the . . . indictment:

a. Adequately reflects the nature and extent of the criminal conduct involved; and

b. Provides the basis for an appropriate sentence under all the circumstances of the case; or

2. Will significantly enhance the strength of the government's case against the defendant or a codefendant.

urge the court to impose a sentence that is "appropriate . . . under all the circumstances of the case." U.S. Dep't of Justice, United States Attorneys' Manual, § 9-27.320 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html. To this end, the prosecutor must endeavor to "ensure that the relevant facts are brought to the court's attention fully and accurately." Id. § 9-27.710 ("Participation in Sentencing—Generally"). This includes "mak[ing] a factual presentation to the court when . . . [i]t is necessary to supplement or correct the [PSI]; [i]t is necessary in light of the defense presentation to the court; or [i]t is requested by the court." Id. § 9-27.720 ("Establishing Factual Basis for Sentence"). Finally, the prosecutor must "[b]e prepared to substantiate significant factual allegations disputed by the defense." Id. Defense counsel also has an obligation to prepare for the sentencing hearing; in fact, the Sixth Amendment requires that defense counsel provide the defendant with effective assistance in all phases of the case. This would include providing the district court with the evidence favorable to the defendant as the court considers § 3553(a)(2)'s sentencing objectives.

The parties should present their sentence requests to the district court after the PSI, and any addendums to the PSI, are in final form and ready for submission to the court. Ideally, the requests should be presented well in advance of the sentencing hearing in sentencing memoranda akin to the pretrial briefs parties routinely present to the district court in advance of a civil bench trial. In

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Id. § 9-27.320 ("Additional Charges").

their sentencing memoranda, the parties should consider presenting the district court with findings of fact and conclusions of law similar to the findings of fact and conclusions of law parties in a civil case present the court prior to or following a bench trial. The memoranda would indicate the Guidelines sentencing range,[42] the sentence the party requests, the primary § 3553(a)(2) purpose the sentence is to serve, and why the sentence would be sufficient, but not greater than necessary to comply with the § 3553(a)(2) purposes.[43]

In formulating their sentencing requests, the parties should first evaluate how well the guidelines listed in the PSI serve as proxies for § 3553(a)(2)'s purposes. As explained, the Guidelines offense level for the offense of conviction is made up of the base offense level, specific offense characteristics, and adjustments. Some of the specific offense characteristics and adjustments may describe acts committed by the defendant in perpetrating the

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[42] This is the sentencing range set out in the PSI or, if the party objects to the PSI Guidelines calculation, the Guidelines calculation and sentencing range the party will ask the district court to reach at the sentencing hearing.

[43] The Northern District of California Federal Public Defender provides a sample sentencing memorandum that explains that it is important to include this information because post-Booker, the court may no longer uncritically apply the Guidelines—it is counsel's responsibility to explain how all of the § 3553(a) factors are implicated in a given case, with an emphasis on (a)(2). N. Dist. Cal. Fed. Pub. Defender, Model Sentencing Memorandum, http://www.ndcalfpd.org/Briefbank/Booker/David%20McColgin%20Model%20Sentencing%20 Memo%204.25.05.htm (last visited June 30, 2010).

offense of conviction; the Commission treats such acts as part of the "real" offense conduct and properly includes them in the offense level as proxies for the § 3553(a)(2)(A)–(B) needs for punishment and general deterrence. Other specific offense characteristics and adjustments, however, may not fairly be said to have any bearing on the defendant's commission of the offense of conviction and thus on the (A) and (B) needs. Therefore, although the Commission treats them as proxies for (A) and (B) purposes, they may be irrelevant to whether the sentence a party proposes is sufficient, but not greater than necessary to satisfy the (A) and (B) needs in the case.[44] Accordingly, in determining the

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[44] For example, there is a 2-point upward adjustment for lying to the probation officer who is compiling the PSI, U.S.S.G. §3C1.1 & cmt. n.4(h), but that conduct usually has nothing to do with the charged offense. The Guidelines manual is littered with adjustments and specific offense characteristics that may or may not be relevant to § 3553(a)(2) in a given case, even if the offender performed the conduct in question. U.S.S.G. § 3B1.5, for example, adjusts the offense level upward if the offender used body armor during a drug offense, but the use of body armor during a simple drug transaction in which the offender does not anticipate any violence might have no bearing on the § 3553(a)(2) purposes. Other examples of potentially irrelevant adjustments include: U.S.S.G. § 3A1.1 (hate crime motivation); § 3A1.2 (whether the victim was a government official); § 3A1.3 (whether the victim was restrained during the offense); § 3B1.3 (whether the offender abused a position of trust or used a special skill); § 3B1.4 (whether the offender used a minor to commit the crime); § 3C1.2 (whether the offender recklessly endangered people during flight); § 3C1.3 (whether the offender was on release when the crime was committed).

proxies for (A) and (B), the defendant may urge the court to remove from the PSI's offense level the specific offense characteristics and adjustments that reflect conduct unrelated to the offense of conviction.[45]

The offense level may not fit the circumstances of the case even after irrelevant considerations are removed. As indicated, the Guidelines offense level applies to all cases involving the offense of conviction; that is, it does not speak to the unique circumstances of a particular case. Consequently, in its sentencing memorandum, a party may urge the court to deviate from the prescribed offense level to take into account one or more of the offense characteristics listed in 28 U.S.C. § 994(c) (which the Commission considered in determining the categories of offenses)[46] that render

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[45] The government will oppose the defendant's request if it believes that the specific offense characteristics and adjustment do bear on the offense of conviction.

[46] In 28 U.S.C. § 994(c), Congress specified the following offense factors:
(1) the grade of the offense;
(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
(4) the community view of the gravity of the offense;
(5) the public concern generated by the offense; (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
(7) the current incidence of the offense in the community and in the Nation as a whole.

the instant case atypical. In doing so, the party would be positing a substitute offense level and using it to support the sentence it will be asking the court to impose.

The parties' sentencing memoranda will also address the prescribed criminal history category, which, coupled with the offense level, would inform the district court's sentencing discretion. If the criminal history category is I, and the government does not contend that the category should be increased on the ground that it "substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes," U.S.S.G.§ 4A1.3(a)(1), the defendant's sentence will be driven solely by the offense level for the offense of conviction—that is, the sentence necessary to satisfy the need for punishment or general deterrence will be more than enough to satisfy any need for specific deterrence.

If the defendant's criminal history category is greater than I, the parties may dispute whether the defendant's punishment for the offense of conviction should be greater on account of his past criminal behavior, see 18 U.S.C. § 3553(a)(2)(A), or, if not, whether such behavior predicts future criminality and thus warrants an additional period of incarceration to protect the public, see *id.* 18 U.S.C. § 3553(a)(2)(C). Regarding the latter, the parties may point to factors that bear on the defendant's likelihood to recidivate but that the Commission did not take into account for policy reasons, such as age and drug abuse.[47] In the end, each party will arrive

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[47] Although the Commission settled on criminal history as the only measure of offender characteristics in the Guidelines, Congress listed in 28 U.S.C. § 994(d) a number

at a criminal history category, which, coupled with the offense level it proposes, will presumably support the sentence it is requesting the district court to impose.

D. The District Court Proceeding

The sentencing hearing is framed by the competing positions of the parties, as expressed in their sentencing memoranda. The government seeks the most severe sentence the facts and circumstances of the case will allow. The defendant seeks leniency. The manner in which the district court conducts the sentencing hearing is relevant to the parties' and the public's perception of whether the sentence imposed is fair or not. Gall, 552 U.S. at 50, 128 S. Ct. at 597. To ensure that it is fair, and thus perceived as such, the sentence must be subjected to the "thorough adversarial testing contemplated by the federal sentencing procedure," Rita v. United States, 551

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of other offender characteristics the Commission could consider in devising the Guidelines:
(1) age;
(2) education;
(3) vocational skills;
(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
(5) physical condition, including drug dependence;
(6) previous employment record;
(7) family ties and responsibilities;
(8) community ties;
(9) role in the offense;
(10) criminal history; and
(11) degree of dependence upon criminal activity for a livelihood.

U.S. 338, 352, 127 S. Ct. 2456, 2468 (2007), and the reasons for its imposition must be explained, id. at 356, 127 S. Ct. at 2468 ("Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of [the judges's] reasons [for the particular sentence imposed] helps provide the public with the assurance that creates that trust."). Moreover, the judge's statement of reasons "allow[s] for meaningful appellate review." Gall, 552 U.S. at 39, 128 S. Ct. at 590.

The adversarial process the Supreme Court mandates involves five steps. After listing them in order, I address them in some detail to indicate what might take place in a typical case in which the parties cannot agree that the Guidelines sentencing range correctly approximates the § 3553(a)(2) purposes. First, the district court determines the Guidelines sentencing range. Id. at 49, 128 S. Ct. at 597; 18 U.S.C. § 3553(a); Fed. R. Crim. P. 32.[48] Second, turning to the prosecutor then to defense counsel, the court asks the parties for their sentence requests and affords them an opportunity to present evidence relevant to each of the four § 3553(a)(2) purposes. Gall, 552 U.S. at 49–50, 128 S. Ct. at 596–97.[49] Third, the court entertains the parties'

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[48] "As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point." Gall, 552 U.S. at 49, 128 S. Ct. at 596.

[49] The record would already contain the evidence adduced at trial or the facts the defendant admitted in pleading guilty. But the parties may wish to present additional evidence relating to, for example, the circumstances of the offense listed in 28 U.S.C. § 994(c), or relating to the offender characteristics in § 994(d) (and specifically his potential for recidivism).

arguments in support of their sentence requests. Id. Fourth, the court determines whether the sentence either party proposes satisfies each of § 3553(a)(2)'s purposes and the parsimony principle. Id. Fifth, the court fashions a sentence that is sufficient, but not greater than necessary to meet those purposes, explains how the sentence does this, and if the sentence deviates from the Guidelines range or the parties' requests, gives the reasons for the deviation. Id.

The first step of the sentencing hearing is to determine whether the Guidelines sentencing range fixed by the PSI is correctly calculated.[50] By "correctly calculated," I mean calculated per the instructions in the Guidelines manual. At this stage, the court will resolve any disputes regarding whether the manual's instructions were properly followed.

In the second step, the district court will entertain the parties' sentencing requests. The government and then the defense will present evidence to support their requested sentences, and this evidence will often show why the Guidelines recommendation is or is not appropriate in the given case.[51] A party might challenge the offense level the

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[50] In doing this, the court will have to resolve any Guideline issues the addendum to the PSI may disclose.

[51] Because the Guidelines "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives," a party may argue that "the Guidelines sentence should not apply." Rita, 551 U.S. at 350–51, 127 S. Ct. at 2465 (emphasis added). Perhaps the PSI's Guidelines calculation "fails properly to reflect § 3553(a) considerations, or perhaps . . . the case warrants a different sentence

court has set by contending that the Commission's generalized treatment of the offense—for example, the weights accorded to characteristics in the base offense level or specific offense characteristics—is inappropriate in the present case.[52] Aside from relying on the circumstances that "mitigate or aggravate the seriousness of the offense," the party might proffer evidence concerning the "community view of the gravity of the offense," or "the current incidence of the offense in the community." This evidence, the party would contend, is relevant to the § 3553(a)(2)(A)–(B) inquiry regarding the needs for punishment and general deterrence. Or, a party might challenge the criminal history category the court has set by proffering evidence on characteristics such as gender, race and ethnicity, employment status, educational attainment, and marital status that the Commission did not consider in establishing the categories of offenders.[53]

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regardless." Id. at 351, 127 S. Ct. at 2465 (citing Fed. R. Crim. Pro. 32(f)).

[52] When the Guidelines were mandatory, "a party seeking a departure generally accepted his base offense level as a starting point and then attempted to show that the case was atypical." United States v. Rodriguez, 406 F.3d 1261, 1287 (11th Cir. 2005) (Tjoflat, J., dissenting from the denial of rehearing en banc). "[U]nder the new model the defendant can also simply concede that his case is typical and challenge the wisdom of the Commission's judgment regarding the appropriate punishment in heartland cases." Id.

[53] A report issued by the Sentencing Commission found that these factors correlated with recidivism. U.S. Sentencing Comm'n, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines

In the third step, the court entertains the parties' arguments in support of their sentence requests.

The court then turns to the fourth step of determining whether either party's proposal meets the four sentencing purposes of § 3553(a)(2) and is the sentence "sufficient, but not greater than necessary to comply with" those purposes. Gall, 552 U.S. at 50, 128 S. Ct. at 597 ("[T]he district judge should . . . consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.").

Finally, the court moves to the fifth step and fashions a sentence which, depending on its fourth-step determination, may mirror a party's request. If neither side prevailed in the fourth step, the sentence the court imposes may be less than the government requested or more than the defendant requested.[54] The court supports the sentence by making factfindings regarding the (a)(2) purposes[55]

11–13 (2004). The SRA instructed the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d). A question I do not purport to answer is whether this provision limits the ability of the district court to consider these offender characteristics in determining a defendant's potential for recidivism under § 3553(a)(2)(C).

[54] I omit from this discussion the possibilities that the record supported a more punitive sentence than the one the government requested or a less punitive sentence than the one defense counsel requested.

[55] These facts may come from the PSI, the trial transcript or guilty plea, or evidence presented by the

and explaining how the sentence is parsimonious to the driving § 3553(a)(2) purpose.[56] In the process, the court must also explain the reasons for any deviation from a party's request or the PSI sentencing range as established in step one.

After pronouncing a sentence, the court elicits

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parties at the sentencing hearing. To the extent that the court intends to take judicial notice of facts, it should notify the parties in advance.

[56] Requiring that district court judges make factfindings on each of the (a)(2) purposes, identify the driving purpose, and explain how the sentence is parsimonious to the driving purpose is more than is currently required of district court judges. As the court's opinion points out, I have authored opinions in which I stated that the district court need not discuss each of the (a)(2) purposes in detail. I did so in adherence to circuit precedent. As we are now sitting en banc, I would overturn that precedent, and, despite the court's contention, see ante at 71, doing so would be entirely consistent with the Supreme Court's statements in Rita.

In Rita, the Supreme Court opined that "we cannot read [§ 3553(c)] (or our precedent) as insisting upon a full opinion in every case. The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances." Rita, 551 U.S. at 356, 127 S. Ct. at 2468. I agree. Sometimes—perhaps when the parties disagree over only minor points or when both parties seek a sentence within the range recommended by the Guidelines—a relatively brief explanation by the district court will suffice to support its finding and to allow appellate review. Other times—perhaps if the parties seek vastly different sentences or fiercely contest the evidence—the district court will necessarily have to provide a more detailed explanation to respond to the parties' arguments, to support its sentence, and to allow meaningful appellate review.

the parties' objections in accordance with United States v. Jones, 899 F.2d 1097 (11th Cir. 1996). The objections are important for appellate review. They also give the court an opportunity to correct any errors it may have made, which if corrected to the objecting party's satisfaction will render an appeal unlikely.

E. Appellate Review

1. Abuse of Discretion Explained

It is axiomatic that the appellate review of a sentence is conducted under the abuse of discretion standard. Rita, 551 U.S. at 351, 127 S. Ct. at 2465 ("'[R]easonableness' review merely asks whether the trial court abused its discretion."); Gall, 552 U.S. at 46, 128 S. Ct. at 594 ("Our explanation of 'reasonableness' review in the Booker opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions."). Under this "familiar" standard, Gall, 552 U.S. at 26, 128 S. Ct. at 594, a district court abuses its discretion when it follows improper procedures, bases its decision on an incorrect interpretation of law or clearly erroneous factfindings, or when the reviewing court is left with the definite and firm conviction that the court committed a clear error of judgment in making the ultimate decision entitled to deference. Klay v. Humana, Inc., 382 F.3d 1241, 1251 (11th Cir. 2004). When conducting this review, the court of appeals may only consider evidence, arguments, and objections presented to the district court. See United States v. Weir, 51 F.3d 1031, 1032 (11th Cir. 1995).

The abuse of discretion standard governs a broad array of appellate inquiries; although the same basic framework applies to all these inquiries, how that framework works in practice depends very much on the nature of the decision being reviewed.[57] See Am. Hosp. Supply Corp. v. Hosp. Products, Inc., 780 F.2d 589, 594 (7th Cir. 1985) (Posner, J.) ("[T]his phrase [abuse of discretion] covers a family of review standards rather than a single standard, and a family whose members differ greatly in the actual stringency of review."). The Supreme Court has said that "[w]hether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise." United States v. Taylor, 487 U.S. 326, 336, 108 S. Ct. 2413, 2419 (1988). In other words, examining what the district court inquiry looks like reveals how and to what the court of appeals defers. As I explained in part II, the sentencing inquiry is primarily a factual inquiry—the district court derives the ultimate sentence from a series of factfindings based on circumstantial evidence, credibility determinations, and sometimes conflicting evidence. In light of the nature of the district court's sentencing inquiry, I deconstruct the abuse of discretion standard and identify how its component parts apply to the district court's sentencing determination. Once simplified this way, the appellate court's task in reviewing sentences for abuse of discretion becomes clear.

I begin with the statement that a district court can abuse its discretion by making a clearly erroneous factfinding. It is well established that a

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[57] The court in this case fails to grapple with the abuse of discretion standard in any meaningful way.

finding of fact is clearly erroneous when "although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. . . . Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. Bessemer City, 470 U.S. 564, 573–74, 105 S. Ct. 1504, 1511 (1985) (quotation omitted). The sentencing inquiry is driven in large part by factfindings: the underlying facts regarding the § 3553(a)(2) factors,[58] the weight given to each piece of evidence, the district court's determinations regarding each § 3553(a)(2) purpose,[59] and the sentence necessary to satisfy each § 3353(a)(2) purpose are all factfindings. As such, the appellate court accepts these findings unless they are clearly erroneous.

A district court can also abuse its discretion by misinterpreting the law, although the fact-intensive nature of sentencing means that there will be fewer instances in which the district court abuses its discretion in this way. Nonetheless, the district court might misinterpret the law in two key ways.[60]

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[58] For example, the defendant's conduct in committing the offense, circumstances about the defendant's background that bear on the offense, evidence about the defendant's mental or psychological condition, or evidence about the defendant's likelihood to recidivate.

[59] For example, how serious the offense was or how great of a need there is for general deterrence.

[60] I do not mean that there only two ways in which the district court can make a mistake of law, but I expect these two ways to be the most common.

First, it would be a misinterpretation of the law for the district court to fail to follow the adversarial procedure required by Gall, which in part requires the court to elicit and consider sentencing requests from the parties and to explain the reasons for its sentence in a way that allows for the parties to object to any perceived errors and for the court of appeals to meaningfully review the sentence. Second, the district court would misinterpret the law if it follows the correct procedural steps but its explanation reveals that it misunderstood the nature of the sentencing inquiry. This would occur, for example, if the district court weighs the § 3553(a)(2) purposes against each other instead of determining the sentence parsimonious to the driving purpose or if the district court erroneously believes that it cannot consider relevant evidence.[61]

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[61] As this explanation shows, abuse of discretion through a misinterpretation of the law generally refers to errors in procedure or in the way the district court conducts its inquiry. This is so because most of the district court's determinations during the sentencing process are factual determinations—how important each (a)(2) factor is, for example. Because the other § 3553(a) factors roll into the (a)(2) inquiry, there are relatively few issues of law for the court of appeals to consider.

For example, the need for a sentence to satisfy the § 3553(a)(2)(A) purpose is a factfinding based on three subsidiary factfindings—the need for the sentence "to reflect the seriousness of the offense, to promote respect for the rule of law, and to provide just punishment for the offense"—which in turn are based on underlying factfindings regarding the offense and the offender (facts such as the offender's criminal history, his ties to the community, his conduct during the offense, and so on). All of these factfindings are reviewed for clear error, and a clearly erroneous factfinding at any point in the process could

Lastly, the court of appeals will reverse the sentence if the district court committed a clear error of judgment. This term must be applied carefully when reviewing a sentence, which necessarily turns very heavily on the district court's assessment of the facts. It seems that when courts use the phrase "clear error of judgment" in this context, they are frequently saying that the court improperly weighed the § 3553(a) factors. See, e.g., United States v. Westry, 524 F.3d 1198, 1222 (11th Cir. 2008) ("A remand for resentencing due to the unreasonableness of a sentence occurs only 'if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a

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render the subsequent factfindings that are based on it clearly erroneous as well. Likewise, a factfinding regarding the need to satisfy an (a)(2) purpose could be clearly erroneous if the underlying circumstantial facts on which it is based do not support the finding.

By contrast, if the district court considers these facts in an impermissible way—for example, by believing that the seriousness of the offense must always be given more weight than the need for just punishment or the need to respect the rule of law in determining the need for a sentence to satisfy (a)(2)(A)—the court will have misinterpreted the law. Similarly, the district court would commit a legal error if it considers patently irrelevant evidence.

The difference is important: by proceeding this way, the court of appeals defers to the district court's factfindings so long as the district court properly understood the inquiry it was performing. The court of appeals thereby ensures that it reviews the facts as found by the district court instead of substituting its own findings regarding the (a)(2) purposes. This makes sense given that Congress designated the district court as the forum for the "main event" in sentencing. See infra part IV.

sentence that lies outside the range of reasonable sentences dictated by the facts of the case.'"). As I have explained, however, the § 3553(a) factors fold into the (a)(2) purposes, and the (a)(2) purposes should not be weighed against each other; rather, the court should identify the (a)(2) purpose that drives the sentence and fashion a sentence parsimonious to that purpose. Moreover, the need to satisfy each (a)(2) purpose and which purpose will drive the sentence are both factfindings, the review of which I have already described.

Therefore, for "clear error of judgment" to do any work in appellate review of a sentence, it must refer to the situation in which the court has imposed a sentence that is more or less than necessary to satisfy the driving purpose. But importantly, the appellate court is not to substitute its own judgment for that of the district court; rather, it must determine whether the district court committed a clear error of judgment by imposing a sentence that cannot be reconciled with its correctly interpreted law and not-clearly-erroneous facts. In some regards, this inquiry is akin to the inquiry an appellate court performs when determining whether the evidence submitted to a jury is sufficient to support the jury's verdict. Cf. United States v. Wright, 392 F.3d 1269, 1273 (11th Cir. 2004) (noting that we "will not overturn a conviction on the grounds of insufficient evidence unless no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). In the sentencing context, though, the appellate court is limited to the facts set forth in the district court's sentencing explanation, which shows what evidence the court deemed relevant and probative and how that evidence

informed the court's decision.[62] Thus, focusing on the district court's sentencing explanation, the appellate court asks whether – in light of the district court's factfindings, its explanation for the sentence, and any deviation from the Guidelines sentencing range and the parties' requests—any rational judge could have concluded that the sentence was "sufficient but not greater than necessary" to achieve the § 3553(a)(2) purposes. If the sentence imposed cannot be reconciled with the § 3553(a)(2) factfindings, the sentence must be vacated.

Deconstructing the abuse of discretion standard shows that appellate review of a sentence should be a clearly delineated, straightforward process. If the district court followed the proper procedures, the court of appeals will have a sentencing explanation that clearly explains the facts found by the district court, how they relate to the (a)(2) purposes, the driving (a)(2) purpose, and how the sentence is parsimonious to that purpose. From the record (which will include the parties' objections and the court's responses), the court will be able to determine whether any factfindings were clearly erroneous in light of the evidence presented.

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[62] The court of appeals must limit its inquiry to the facts set out in the district court's sentencing explanation for the abuse of discretion standard to have any force. Otherwise, the court would be free to search the entire record and make its own factual findings. This, of course, would be inconsistent with the notion that the court of appeals must defer to the district court's proper exercise of discretion. If the district court wholly ignores relevant evidence or a party's argument (and the party objects), the court will have erred by misinterpreting the law, which requires that it respond to evidence presented and arguments made by the parties. Fed. R. Crim. P. 32(i)(3)(B).

It will also be readily evident whether the district court properly understood the nature of the sentencing inquiry. From there, the court asks whether there are sufficient facts in the record to support the sentence—that is, it must determine whether any reasonable judge could find, based on the facts clearly found in the record, that the sentence imposed is parsimonious to the driving purpose.[63] With this framework in mind, I now

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[63] Consistent with the Supreme Court's explanation of sentencing review in Gall, many of our cases incorporate a boilerplate statement of the standard of review as consisting of two steps: procedural and substantive reasonableness. Our cases routinely include a statement like this:

> "We review sentencing decisions only for abuse of discretion, and we use a two-step process." United States v. Shaw, 560 F.3d 1230, 1237 (11th Cir. 2009). First, we must "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." Id. (quoting Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 597, 169 L. Ed. 2d 445 (2007)). If we conclude that the sentence is procedurally sound, the second step is to review the "substantive reasonableness" of the sentence, taking into account the totality of the circumstances, "including the extent of any variance from the Guidelines range." Gall, 552 U.S. at 51, 128 S. Ct. at 597.

United States v. Alfaro-Moncada, __ F.3d __, 2010 WL 2103442 (11th Cir. 2010). Nothing I say here is inconsistent with this language. My goal is simply to peel back the boilerplate language and explain how the abuse of discretion

explain how the court of appeals should review each step of the sentencing hearing I set out in the previous section.

2. Reviewing the Sentencing Hearing

Having carefully examined the abuse of discretion standard in the sentencing context, I now show how appellate review under that standard identifies abuses of discretion at each step of the sentencing hearing.[64] I posit a case in which a party

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standard addresses the procedural and substantive unreasonableness concerns described in Gall and in our cases.

When a district court hands down a procedurally unreasonable sentence, it has abused it discretion by either making a clearly erroneous factfinding or by misinterpreting the law. All of the errors labeled as procedural in Gall—"failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence," 552 U.S. at 51, 128 S. Ct. at 597—are instances in which a district court has abused its discretion by making a clearly erroneous factfinding or by misinterpreting the law. If the sentence is procedurally reasonable (that is, no clearly erroneous factfindings and proper interpretation of the law), Gall instructs the courts of appeals to turn to the substantive reasonableness of the sentence. Id. Because the appellate court is not to substitute its own judgment for the district court's, id., substantive review means ensuring that the record supports the district court's determination that the sentence imposed is the one sufficient but not greater than necessary to satisfy the driving sentencing purpose, which is the clear error of judgment inquiry.

[64] As the Supreme Court has emphasized in Rita and

contends that the district court failed to follow the five-step process.[65] The party also contends, alternatively, that, if the court followed that process, its rulings in at least one of the steps were erroneous.[66] The court of appeals considers each challenge seriatim, under the abuse of discretion standard; that is, it examines for clear error the facts on which the district court based its ruling and the district court's application of the law de novo. If the district court abused its discretion at any step, the inquiry ends there. The sentence must be vacated,

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Gall, the process the district court employs to reach its sentencing decision is vitally important to the perception that the sentence handed down is fair. If the process is tainted, it matters not whether the sentence might appear to be fair; the sentence is perceived as tainted as well. What Gall and our cases routinely refer to as "procedural" review encompasses what appears in my discussion as steps one through four and the district court's explanation of the sentence at step five. What Gall and our cases refer to as "substantive" review involves only the final inquiry at step five—whether the record supports the district court's decision.

[65] It is well settled that a district court's failure to follow the prescribed process constitutes an abuse of discretion. Klay, 382 F.3d at 1251. In the case I posit in the text, the appellant challenges the district court's ruling in all five steps of the sentencing process. Because these steps reflect the process required by the law, failing to follow them demonstrates that the district court abused its discretion by misunderstanding the law.

[66] I am assuming that these challenges were presented to the district court in the form of objections and were preserved for appeal in accordance with United States v. Jones.

and the case remanded for resentencing.[67] If there is no abuse of discretion in a step, the court proceeds to the next.

Step one required the district court to determine the Guidelines sentencing range for the case. This determination is vulnerable to attack on two fronts: the district court's factual findings and its application of the Guidelines to the facts. If the factfindings are clearly erroneous, the district court abused its discretion. If the factfindings survive clear error review, the question becomes whether the court erred in applying the Guidelines to the facts. If in doing so the court made an "identifiable legal mistake" in interpreting the Guidelines or if it "clear[ly] err[ed]" in applying them, the court abused its discretion and the sentence must be vacated and the case remanded. See United States v. White, 335 F.3d 1314, 1317–19 (11th Cir. 2003).

At step two, the district court was required to give the government, and then defendant, the opportunity to present their sentence requests and to provide a factual basis in support of their proposals.[68] If the court failed to afford the parties the opportunity to present their case, it abused its discretion (by misinterpreting the law requiring it to

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[67] The step-by-step appellate review I describe includes application of the harmless error doctrine. In most cases—especially the mine run cases where the dispute centers on where within the Guidelines sentencing range the sentence should have been imposed—the review will focus on fewer than the five steps the district court took in fashioning the sentence.

[68] Because the government initiated the criminal proceeding, it has the burden of first going forward with its sentencing proposal.

provide such an opportunity) and the defendant's sentence must be vacated.

At step three, the court must have given the parties the opportunity to argue—in light of all of the evidence presented at step two—that the sentences they have requested are supported by the § 3553(a) factors and are "sufficient but not greater than necessary" to achieve § 3553(a)(2)'s purposes. If the court failed to do this, it abused its discretion (by misinterpreting the law), and the sentence must be vacated.

Step four asked the district court to determine whether either party's sentence proposal fulfilled § 3553(a)(2)'s sentencing purposes, was not inconsistent with the remaining § 3553(a) factors, and satisfied the statute's parsimony requirement. If the court failed to engage in this process, it abused its discretion (by misinterpreting the law) and the sentence must be vacated.

Step five required the district court to select and explain a sentence supported by § 3553(a)'s factors and, moreover, a sentence "sufficient, but not greater than necessary" to meet § 3553(a)(2)'s objectives. If the sentence deviated from the Guidelines sentencing range for the case, the court had to set forth the reasons for the deviation. The first question the court of appeals must answer is whether the district court's explanation for the sentence is sufficient to permit meaningful appellate review. Rita, 551 U.S. at 357, 127 S. Ct. at 2469. If not the sentence should be vacated and the case remanded for further proceedings on the ground that the district court misinterpreted the law requiring it to provide such an explanation. The court of appeals also determines whether any facts relied on in the

sentencing explanation were clearly erroneous. If the explanation is sufficient and the facts not clearly erroneous, the question becomes whether the record reasonably supports the district court's explanation and therefore the sentence. If it does, the district court did not commit a clear error of judgment and did not abuse its discretion.

In sum, appellate scrutiny of a sentence is performed through the classic abuse of discretion lens. This is consistent with Gall's command that a district court's sentence is reviewed for abuse of discretion whether inside or outside the Guidelines sentencing range. Gall, 552 U.S. at 51, 128 S. Ct. at 597. It is also consistent with the district court's sentencing expertise. The district court is unquestionably the best judicial actor to apply the fact-heavy and open-ended inquiry demanded by § 3553(a) and to fashion a sentence in accordance with the parsimony principle. See id. ("The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case.") (quotation omitted).

III. Applying the Sentencing Model

Irey's sentence must be vacated and the case remanded because the court failed to explain its deviation from the Guidelines sentencing range and its denial of the Government's request and because it failed to make intelligible findings on two of the four § 3553(a)(2) purposes.

A. Irey's Sentence

The Government charged William Irey with

one count of sexual exploitation of children under 18 U.S.C. § 2251(c). In relevant part, § 2251 proscribes "employ[ing] . . . any minor to engage in . . . any sexually explicit conduct outside of the United States . . . for the purpose of producing any visual depiction of such conduct," and "transport[ing] such visual depiction to the United States." Id.[69] The statute carries a mandatory minimum of 15 years' imprisonment and a maximum of 30 years' imprisonment. Irey pled guilty and was sentenced to 17.5 years' imprisonment.[70]

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[69] As stated in the text, § 2251(c) makes it a crime to employ a single minor in committing the offense. Irey's indictment, however, alleged that he employed "minors" in committing the offense.

[70] Irey was sentenced not only for committing the offense alleged in the indictment, but for committing several uncharged offenses as well. In imposing sentence, the district court adopted the following provision:

> Pursuant to U.S.S.G. § 2G2.1(d)(1), if the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction. There were at least forty minors exploited. The highest offense level allowable by the guidelines is a level 43. If the exploitation of each of the forty minors is scored as if it were contained in a separate count, the offense level would be well over the available maximum level of 43. Therefore, only two groups were utilized in determining the offense level.

As the court's opinion correctly states, the Guidelines sentencing range (according to the PSI, which the district court adopted) called for life imprisonment, see ante at 12, whereas the statutory maximum penalty for Irey's one-count conviction was 30 years' imprisonment. The Principles of Federal Prosecution instructs that prosecutors, in advising

1. Guidelines Calculation

Irey's sentencing process began with the presentence investigation. The PSI set out Irey's conduct in eighteen paragraphs. Because the court has already detailed that conduct, I will not replicate it here. Suffice it to say that Irey flew to Cambodia on numerous occasions, hired child prostitutes, photographed and videotaped himself having sex with them, brought the images back to the United States, and traded them on child pornography websites. The PSI found that Irey had abused over forty children.

Section 2G2.1 of the Guidelines applied, which carried a base offense level of 32.[71] The PSI found four specific offense characteristics, which increased the offense level by 12: 4 levels because the offense involved minors under age twelve; 2 levels because

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the grand jury, recommend that the grand jury indict the putative defendant "with the commission of additional offenses when additional charges . . . are necessary to ensure that the . . . indictment . . . provides the basis for an appropriate sentence under all the circumstances of the case." Principles § 927.320. See supra note 41. I assume that the prosecutor knew that Irey would have to be charged with additional § 2251(c) violations in order to "provide[ ] the additional basis for an appropriate sentence under all the circumstances of the case," i.e., a sentence that would be commensurate with the Commission's Guidelines determination of what would be appropriate. The prosecutor either presented the grand jury with additional charges but it refused to indict, or did not present them at all.

[71] Section 2G2.1 covers three crimes: 18 U.S.C. §§ 1591 (sex trafficking of children), 2251 (sexual exploitation of children), and 2260 (production of child pornography for importation to the United States)

the offense involved sexual contact; 2 levels because the offense involved distribution of child pornography; and 4 levels because the offense portrayed sadistic or masochistic conduct. Two more levels were added under the Guidelines' "multiple counts" rules because, under § 2G2.1(d), "whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction."[72] U.S.S.G. § 2G2.1 cmt. n.5. Finally, the PSI reduced the offense level by 3 levels based on its finding that two adjustments applied: 2 levels because Irey accepted responsibility for the crime, and 1 level because he provided timely notification of the intent to plead guilty. All told, Irey's total offense level was 43.

Because Irey had no criminal convictions, he fell into criminal history category I. An offense level of 43 and a criminal history category I yielded a Guidelines sentencing range of life imprisonment, which well exceeded the statutory maximum. The Government did not object to this calculation. Irey objected to the use of the 2006 Guidelines, the PSI's representation of his ability to pay restitution, and the PSI's statement that there were no grounds for departing from the Guidelines on the grounds that "Irey's psychiatric condition and his lack of a criminal record support a sentence below the advisory guideline range." In support, Irey attached

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[72] The probation officer applied the multiple counts rules for only two counts of conviction because "[i]f the exploitation of each of the forty minors is scored as if it were contained in a separate count, the offense level would be well over the available maximum level of 43." See supra note 70.

a report of Dr. Fred Berlin, which explained Irey's psychiatric condition. (Def.'s Objection to Presentence Investigation Report 2.)

2. Sentencing Memoranda

The parties filed sentencing memoranda in advance of the sentencing hearing. The Government filed its memorandum first, which totaled five pages. After a two-paragraph recitation of the facts, the Government asked for a Guidelines sentence. Anticipating Irey's case for an outside-Guidelines sentence, the Government argued that U.S.S.G. § 5K2.0(b) governs departures in child sex abuse cases; § 5K2.0(b) only permits departures on grounds authorized by the Commission; and the Commission had not authorized departures on the basis of diminished capacity, aberrant behavior, or family ties and responsibilities. Although the Government recognized that Booker invalidated § 5K2.0(b), it urged the court to defer to Congress's policy preferences and pointed out that doing so would be consistent with § 3553(a)(5)'s instruction to take into account the Commission's policy statements. Finally, the Government argued that if the "case is atypical, it is because of aggravating, not mitigating, factors," and that Irey's conduct and characteristics clearly fell within the heartland of the Guidelines. Accordingly, the Government asked for a Guidelines sentence.[73]

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[73] The Government's memorandum did not address how the Guidelines calculation fit the particular facts of the case in light of § 3553(a). The Government did not propose any § 3553(a) findings or identify how its proposed sentence fulfilled the § 3553(a)(2) purposes. Its only reference to any

Irey's eleven-page sentencing memorandum was more substantial. Irey argued that in light of his acceptance of responsibility, pedophilia, history as a positive contributor to society, lack of criminal history, and low risk of recidivism, a sentence below 30 years' imprisonment was reasonable. (See Def.'s Sentencing Mem. 1.) That said, Irey "acknowledged" the "serious nature" of his conduct and "conceded" that a substantial term of imprisonment was appropriate. (Id.) Accordingly, Irey asked for a sentence of 15 to 20 years' imprisonment followed by a substantial term of supervised release. (Id. at 11.)

In arguing for a below-Guidelines sentence, Irey cited three child pornography cases where a district court's downward variance was affirmed on appeal. Irey then focused on the § 3553(a) factors and the parsimony principle and argued that less than 30 years' imprisonment would be appropriate because: (1) at 50 years old, Irey would be an old man when released from prison even if he served just the 15 year minimum sentence; (2) Irey's expert psychological reports demonstrated that he is a pedophile who had a "limited ability to control the behavior supporting the offense of conviction" and presented a "low risk of recidivism"; and (3) that Irey still had the support of his family. (Id. at 9.) Irey also briefly criticized the Guidelines in light of § 3553(a), arguing that some of the specific offense characteristics were cumulative. (Id. at 10.) In terms of evidence, Irey submitted two expert witness reports and numerous character letters from his

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§ 3553(a) factor was to (a)(5), which requires consideration of the Commission's policy statements. The Government did not cite any evidence beyond what was in the record and the PSI; it focused its arguments on the Guidelines.

family and friends.

3. Sentencing Hearing

The district court did not follow the sentencing hearing procedure I have outlined.[74] The sentencing hearing began with the district court adopting the PSI's findings of fact and Guidelines applications. But rather than hear argument on how well the Guidelines approximated the § 3553(a) factors, the court turned to Irey and his plea for mitigation.

Irey put on nine witnesses, including himself. His "star" witness, however, was a psychiatrist, Dr. Shaw. On direct examination, Dr. Shaw essentially testified that Irey was a pedophile who presented a "moderate to low risk of recidivism" based on "empirically validated actuarials." Before permitting cross-examination, the court asked Dr. Shaw whether pedophilia is an illness and whether a pedophile who acts out does so out of "rational free will." This resulted in the exchange that the court details and criticizes at length. See ante at 83–87. On cross-examination, the Government did not impeach Dr. Shaw in any meaningful way.[75] After

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[74] This is not entirely surprising given the courts of appeals' confusion regarding the proper way to review sentences. See infra note 84.

[75] The Government simply had Dr. Shaw admit: (1) Irey was a pedophile with interest in children younger than 13; (2) the actuarials used had control groups that included rapists and pedophiles who were interested in children above the age of 13; (3) that depression and alcoholism do not cause pedophilia; and asked a series of questions designed to elicit the depth of the expert's knowledge of

Dr. Shaw, Irey put on eight character witnesses. Finally, Irey briefly testified to apologize for his crimes. After entering this evidence, Irey's counsel made his argument, which rehashed with some embellishment the argument contained in his sentencing memorandum.[76] At the end of the day, Irey argued that a sentence of between 15 and 20 years' imprisonment with up to a lifetime of

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Irey's crime. (Sentencing Hr'g Tr. 21–24.)

[76] Among other points, Irey's counsel argued:

> [W]e submit, Your Honor, that a 360-month sentence here is greater than necessary for Mr. Irey in light of the mitigation that's been presented.
>
> There is no way to minimize . . . the gravity of the acts with which Mr. Irey is charged. You've heard the mental health professionals tell you that this is a compartmentalized area of his whole being that is a result of his pedophilia, which is a diagnostic criteria for psychiatric care.
>
> What I gathered from Dr. Shaw's testimony and the best I could from Dr. Berlin's report is that the behavior of a pedophile is not totally volitional, that is, it is dictated in some degree by the disease itself. . . .
>
> . . . .
>
> [Irey] understands that he needs to be punished. . . . But he asks the Court to give him some consideration for the rest of his life, separate and apart from the crime he has committed.
>
> . . . .
>
> You've heard that he's treatable. You've heard that he's a low risk of recidivism. That would make him 66 or 71 when he got out, if he served the entire sentence. He would be an old man. We ask you to consider a sentence less than the guideline's recommended sentence.

(Sentencing Hr'g Tr. 49–52.)

supervised release would be sufficient but not greater than necessary to comply with § 3553(a).

Then came the Government's case. The prosecutor put on no witnesses and offered no evidence with the limited exception of a few sample images it showed the court during the course of the argument. The prosecutor began her argument with the observation that "the defendant is not being prosecuted for being a pedophile . . . . As an alcoholic doesn't have to drive a car, a pedophile doesn't have to put themselves in a brothel in Cambodia, which this defendant did for years and years . . . ." (Sentencing Hr'g Tr. 53–54.) She then emphasized that this was not a child pornography possession case, but a production case and that Irey "ruined, just absolutely and forever ruined over 50 children's lives," sometimes smiling while he did it. (Id. at 54–55.) Asking the court to look at the sample images, the prosecutor explained that the children were between 4 and 6 years old and that Irey's distribution of the images over the Internet had made the pictures infamous. She encouraged the court to consider the offense, the victimization, and the "message we send to people who would do this." (Id. At 55–56.) In the end, the prosecutor focused on the "viciousness" of Irey's crime—over 1200 images of "torture" and some of the worst child pornography the agents had ever seen—and asked the court to impose a 30 year sentence. (Id. at 56–57.)

4. District Court's Findings

After hearing from both parties, the court made its findings on the record. The court first explained its task:

> I take into account the guideline score and consider that as a benchmark in terms of imposing an appropriate sentence in a given case, and that benchmark needs to be kept in mind throughout the analysis . . . . But what I need to do after determining the guideline score is to look at the other 3553(a) factors on an individualized basis in an effort to determine an appropriate sentence for this particular case.

(Id. at 57.)

Without saying anything more about the Guidelines, the court launched into an analysis of the § 3553(a) factors, beginning with § 3553(a)(1)—the nature and circumstances of the offense and the history and characteristics of the offender. The court characterized the offense as "horrific": "The victims were numerous and perhaps the most vulnerable of the world's society. So I don't think that there's any question but we're dealing with here with an offense that rises to the very top in terms of seriousness and its effect on other human beings." (Id. At 58 empahasis added.)) Summarizing, the court found that "the seriousness" of the offense "certainly does not mitigate in favor of any leniency." (Id.) Turning to Irey's history and characteristics, the court found that Irey had been a good family man and community member, the acts that brought him before the court were "not purely volitional" and "due in substantial part to a recognized illness," and he had a "low" risk of recidivism. The recidivism finding turned on two points: (1) the court credited the

expert testimony, and (2) Irey's age—as the court put it, "by the time he gets out of prison he'll most likely be at an age where recidivism would be unlikely, just from a physiological standpoint." (Id. at 59–60).

The court then skipped § 3553(a)(2)(A), jumping to § 3553(a)(2)(B) and (C). Regarding general deterrence, the court found that a serious sentence would "hopefully" deter others, but that conclusion might not "rationally follow[]" because of the illness of pedophilia. (Id. at 60.) Turning to specific deterrence, the court referred to its findings on § 3553(a)(1), reiterated that the mental health professionals categorized Irey as presenting a low risk of recidivism, and therefore found that society did not need "further protection from him, at least beyond the statutory minimum sentence." (Id. at 61.)

Finally, the court seemed to return to § 3553(a)(2)(A), stating "[i]t comes down to my view of what promotes respect for the law and provides just punishment." (Id.) Here is the entirety of its discussion: "as indicated, I think that a 30-year sentence, given the personal factors that I have touched upon, is greater than necessary to accomplish the statutory objectives. On the other hand, in light of the seriousness of the crimes, I think a sentence above the mandatory minimum is called for." (Id.)

5. Final Sentence and Objections

The court immediately—without hearing any argument on the application of the parsimony principle to its findings—announced the sentence. The court settled on 210 months' imprisonment (or

17.5 years), a special assessment of $100, forfeiture, and a lifetime term of supervised release (which included a mandatory substance abuse and mental health program specializing in sex offender treatment). (Id. at 61–62.)

In accordance with Jones, the court then asked whether there was any objection to the sentence or the manner in which it had been pronounced. The prosecutor objected to "the extent of the variance, which is almost half, and based on the factors adduced in this record, particularly the seriousness and long-term nature of the offense, [that] the extent of that variance would be unreasonable." The court merely responded that the sentence was "more like 60 percent of the guideline, not half." (Sentencing Hr'g Tr. 65.)

B. Why the Sentence Must be Vacated and Remanded

Irey's sentence must be vacated and the case remanded for resentencing. As I explained in part II.E, supra, a district court abuses its discretion in imposing a sentence when it follows improper procedures, bases its decision on an incorrect interpretation of law or clearly erroneous factfindings, or when the reviewing court is left with the definite and firm conviction that the court committed a clear error of judgment in making its sentencing decision. The Government objected to Irey's sentence on substantive reasonableness grounds, and I would vacate Irey's sentence on those grounds: the sentence imposed cannot be reconciled with the district judge's factfindings on §

3553(a)(2)(A).[77]

When making his findings on § 3553(a)(1), the judge remarked that when considering the "nature and circumstances" of the offense, the crime "r[ose] to the top" in terms of seriousness and that the "seriousness of the offense . . . did not mitigate in favor of any leniency." On (a)(2), after explaining why the need for specific deterrence counseled a sentence of no more than 15 years' imprisonment based on Irey's pedophilia, age, and family ties, the court turned to the sentencing purpose of

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[77] I would also find that the district court followed improper procedures and committed legal errors by not following the model that I set forth, had the Government objected on those grounds. This is the case for at least two reasons. First, the district court failed to follow the requisite adversarial procedure. Importantly, it did not adequately address either the Guidelines recommendation or the Government's request for a 30 year sentence—that is, it neglected to articulate the reasons why such a sentence was greater than necessary to satisfy the § 3553(a)(2) purposes. Gall clearly indicates that the failure to explain a deviation from the Guidelines range constitutes error. Gall, 552 U.S. at 51, 128 S. Ct. at 597 (explaining that the court must "adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range"). Here, the court made no effort to explain why it sentenced Irey to 17.5 years' imprisonment when the Guidelines called for 30 years' imprisonment. Second, it is impossible for this court to determine which § 3553(a)(2) purpose drove the sentence.

This is not to be overly critical of the district court. In this circuit, the law governing sentencing has been at sea. This circuit's precedent has not made clear the steps a district court must follow, nor has it clarified the importance of making findings regarding the (a)(2) purposes. The district judge followed the procedural and substantive law as best he could discern it.

punishment, (a)(2)(A). The entirety of the court's discussion on (A) was as follows:

> It comes down to my view of what promotes respect for the law and what provides just punishment. I think that a 30-year sentence, given the personal factors that I have touched upon is greater than necessary to accomplish the statutory objectives. On the other hand, in light of the seriousness of the crimes, I think a sentence above the mandatory minimum is called for.

(Id. at 61.)[78]

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[78] Given the context and content of this finding, it is unclear that the court understood the proper § 3553(a)(2)(A) inquiry. The court did not explain what it meant by "personal factors." It may have been referring to Irey's low risk of recidivism, which it had just found. If so, the court erred because a finding on specific deterrence has no bearing on (a)(2)(A). As I note in part II.B, supra, culpability does bear on the (a)(2)(A) need. For this reason, criminal history can be relevant to (a)(2)(A). U.S.S.G. Ch.4, Pt.A, intr. comment. Even though criminal history might be relevant to both (a)(2)(A) and (a)(2)(C), that does not mean that the court's finding regarding specific deterrence (which will be based on a number of factors, including criminal history) has any bearing on the (a)(2)(A) need.

Of course, the court may have simply been referring to the same personal factors it had drawn on for the § 3553(a)(2)(C) analysis to set up an independent § 3553(a)(2)(A) analysis. Generally, considering an offender's personal characteristics for their impact on the need for just punishment for the offense and the need to promote respect for the law is permissible. For example, it stands to reason that someone who acts under duress is less culpable and therefore should receive less punishment than an ordinary

The inquiry a court should conduct on (a)(2)(A) involves three steps: (1) making findings regarding the seriousness of the offense, the need to promote respect for the rule of law, and the need for just punishment; (2) weighing the three considerations against each other; and (3) making findings on the sentence needed to meet the § 3553(a)(2)(A) purpose.[79] The district court, in making its (a)(2)(A) findings, failed to follow these three steps. While it mentioned the need to "promote[] respect for the law" and "provide[] just punishment," it made no intelligible findings on these inquiries and gave no indication that it had considered facts crucial to any determination of the need for "just punishment" and the need "to promote respect for the law" (for example, the sentences other offenders received).[80] Similarly, although the court stated here that the seriousness of the offense "called for" "a sentence above the mandatory minimum," it made no specific findings on the seriousness of the offense when conducting the (a)(2)(A) inquiry. I do

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offender. It also stands to reason that the court's failure to take account of that difference would promote disrespect for the law. In such cases, however, the court must explain its reasoning.

[79] The court's narrow focus on Irey's personal characteristics belies that it was conducting this analysis.

[80] It is unclear why the court omitted the "seriousness of the offense" when it said "it comes down to my view of what promotes respect for the law and what provides just punishment." It may have been because the court thought it had settled the issue of the seriousness of the offense during the § 3553(a)(1) inquiry.

know, however, what the court would find on the seriousness of offense from what it said during the (a)(1) inquiry. There, it found that the offense was "horrific," "rises to the very top in terms of seriousness" and that "in terms of the . . . seriousness of [the offense], the long-standing, long-term engagement in it certainly does not mitigate [sic] in favor of any leniency."

Therefore, all I know about the district court's findings on (a)(2)(A) is that it found the offense to be very serious. It is inconceivable that the judge's finding on seriousness of the offense alone would translate into a sentence at the bottom half of the statutory sentencing range of 15 to 30 years, let alone a sentence only two and a half years above the statutory minimum. The court, in conducting its (a)(2)(A) inquiry, may have concluded that the three relevant considerations were in tension—with the seriousness of the offense counseling a sentence at or near the top of the statutory range, but, for example, with Irey's impaired volition and advanced age decreasing the need for just punishment and respect for the law. If this were the case, the evidence in the record could support a sentence of 17.5 years,[81] but it is not our province to make this explanation for the judge. Without making intelligible findings on

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[81] On the other hand, if the district court's findings on just punishment and respect for the law were consistent with his finding on the seriousness of the offense, (a)(2)(A) would drive Irey's sentence, and a sentence of 17.5 years could not be reasonable. Because the judge's findings on (a)(2)(A)—unlike the three subsidiary inquiries under (a)(2)(A)—cannot be weighed against the other (a)(2) factors, the sentence imposed would have to be harsh enough to satisfy the strong (a)(2)(A) need.

just punishment and respect for law, and without explicitly weighing the three inquiries and reaching a conclusion on how they bore on the (a)(2)(A) need, I simply cannot say on appellate review that the sentence imposed was supported by the district court's factfindings. All I have is the district court's finding on the seriousness of the offense, and I know that it cannot be reconciled with the sentence imposed. No rational judge could have sentenced Irey to 17.5 years based on the only intelligible finding—that seriousness rose to the top for this "horrific" crime.[82] I would therefore vacate Irey's sentence on the ground that it is not supported by the district court's findings, as I am able to understand them.[83]

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[82] Contrary to the court's characterization of my opinion, I would not vacate Irey's sentence on the ground that the district court's findings are insufficiently "detailed" or "lacking in specificity or effort." Ante at 68, 72. My point is not, as the court implies, that a district court's findings need be of a certain length or belabor unnecessary points. My point on substantive reasonableness is that a district court's findings must be reconcilable with the sentence imposed. Had the district court imposed a sentence that was reconcilable with the (a)(2)(A) findings it made, I would not vacate Irey's sentence on substantive reasonableness grounds, even if the district court had failed to make proper (a)(2)(A) findings on respect for the law and just punishment. In this instance, I would vacate the sentence because the findings the district court made on the seriousness of the offense cannot be reconciled with the sentence imposed, and given the district court's failure to properly address the other (a)(2)(A) considerations, I cannot assume that they balanced the court's finding on seriousness of the offense.

[83] It is also unclear what the district judge's findings

I would remand Irey's sentence to the district court so that the district court can make (a)(2) findings and resentence Irey accordingly—rather than making our own (a)(2) findings to determine whether the sentence is reasonable. To do so, we would have to step out of our role as a reviewing court and assume the role of resentencer. As I now

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on general deterrence were and whether they supported the sentence, though I need not address this question because it is clear that the sentence imposed was not supported by the judge's findings on (a)(2)(A). Here is the entirety of the court's discussion of § 3553(a)(2)(B):

> There are other aspects of the statute that essentially are subjective in nature. Of course, adequate deterrence to criminal conduct. I mean a serious sentence is hopefully going to deter others from conducting similar affairs, although when we're dealing with an illness like this, I'm not sure that that rationally follows. But, nevertheless, deterrence is an appropriate consideration, and a stiff sentence is in keeping with the seriousness of this offense.

(Id. at 60.)

The court's statement that general deterrence is "essentially subjective in nature" indicates that the court did not understand the § 3553(a)(2)(B) inquiry. The inquiry includes the incidence of the crime in the community and the community view of the offense. The court should have taken into account its earlier finding that child pornography is an "epidemic," driven by its ready availability on the Internet. Regardless, it is unclear what the court found at the end of the day regarding the need for general deterrence—whether it reasoned that the need for general deterrence should be discounted because of the illness of pedophilia or whether the need for general deterrence was great and counseled a harsh sentence. If it were the latter, the sentence imposed may not be sufficient to satisfy the need for general deterrence as found by the district judge.

explain, this is precisely the error the court makes today.

IV. The Court's Approach

Today, the court needlessly assumes the role of resentencer. In so doing, it cements this circuit's answer to a question that continues to vex the nation's courts of appeals: after Booker, what does appellate review of sentences for substantive "reasonableness" under an abuse of discretion standard mean?[84] The correct answer, as I

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[84] The federal courts of appeals, including this court, approach substantive reasonableness review inconsistently. This is not surprising since, as the Supreme Court itself has recognized, "Apprendi, Booker, Rita, Gall, and Kimbrough have given the lower courts a good deal to digest over a relatively short period." Spears v. United States, 129 S. Ct. 840, 845 (2009) (per curiam) (quotation omitted). Specifically, the courts and their judges differ in the amount of deference they purport to afford the district court's weighing of the § 3553(a) factors. Compare United States v. Pugh, 515 F.3d 1179, 1191 (11th Cir. 2008) ("[W]e may find that a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably yields an unreasonable sentence. We are therefore still required to make the calculus ourselves . . . .") and United States v. Tomko, 562 F.3d 558, 585-86 (3d Cir. 2009) (Fisher, J., dissenting) ("As the remainder of our analysis reveals, the District Court's overreliance on § 3553(a)(1) as justification for the significant qualitative and quantitative variance it granted pales in comparison to the numerous § 3553(a) factors which suggest that a term of imprisonment

demonstrate in parts III and IV, supra, is to apply

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is warranted . . . . [W]e conclude that the relevant § 3553(a) factors advocate in the strongest possible terms for a sentence including a term of imprisonment.") with Tomko, 562 F.3d at 574 (majority opinion) ("Accordingly, the substantive reasonableness of each sentence must be evaluated on its own terms, based on the reasons that the district court provided, in light of the particular facts and circumstances of that case.") (emphasis added) and United States v. Smart, 518 F.3d 800, 808 (10th Cir. 2008) ("We may not examine the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them, as a legal conclusion to be reviewed de novo.").

Moreover, appellate courts and circuit judges across the country have openly expressed confusion about the appropriate role of appellate courts. See, e.g., United States v. Feemster, 572 F.3d 455, 467 (8th Cir. 2009) (Colloton, J., concurring) ("[O]ne searches in vain for a principled basis on which to conduct a consistent and coherent appellate review for reasonableness."); United States v. Funk, 534 F.3d 522, 530 (6th Cir. 2008) (Boggs, C.J., dissenting) ("This case represents essentially a judgment call under the rather unclear standard of 'reasonableness' that we have been given by the Supreme Court in the wake of Rita, Kimbrough, and Gall."). Likewise, commentators have noted the Supreme Court's seemingly contradictory imperatives. E.g.,Frank O. Bowman III, Debacle: How the Supreme Court has Mangled American Sentencing Law and How It Might Yet Be Mended, 77 U. Chi. L. Rev. 367, 459–60 (2010) (claiming that the Supreme Court's entire line of Sixth Amendment sentencing cases presents a "tangle of rules and exceptions" that "is obviously neither simple nor, as illustrated at length above, logical"); Lindsay C. Harrison, Appellate Discretion and Sentencing after Booker, 62 U. Miami L. Rev. 1115, 1115–16 (2008) ("What has resulted is primarily confusion about the role of the appellate courts in reviewing sentences. Several often seemingly conflicting imperatives are at play after Booker . . . .").

classic abuse of discretion review. The court's answer is shocking: a simple objection that a sentence is "unreasonable" grants a disappointed party the functional equivalent of a new sentencing hearing before the court of appeals. The court considers evidence and arguments never offered to the district court, makes new findings, reweighs the § 3553(a) factors, and concludes as a matter of law that William Irey must be sentenced to 30 years' imprisonment. In the process, the court does immense and immeasurable institutional damage. Part A sets out the court's approach; Part B explains the harm that it causes.

A. Appellate Resentencing

According to the court, the question presented is whether Irey's sentence is "reasonable." Ante at 35. In determining whether the sentence is "reasonable," the court unabashedly explains that its job is to take the facts found by the district court and any others it finds in the record, and then make its own findings for each § 3553(a) factor. Id. at 58–59. After making its own findings, the court reweighs the § 3553(a) factors and determines for itself what range of sentences is reasonable. Id. at 58 ("In order to determine whether that has occurred, we are 'required to make the [sentencing] calculus ourselves' and to review each step the district court took in making it.") (quoting United States v. Pugh, 515 F.3d 1179, 1191 (11th Cir. 2008)). By "reasonable," the court means the sentencing range that it thinks is objectively correct to satisfy the sentencing purposes of § 3553(a).

The court even goes so far as to declare,

incorrectly and without any support, that the weight of facts under § 3553(a) presents a question of law. Id. at 59 ("[T]he importance of facts in light of the § 3553(a) factors is not itself a question of fact but instead is an issue of law.") (emphasis added); id. at 118, n.33 (justifying the court's new finding on the need for specific deterrence in sex crime cases because "[n]o member of this Court . . . has ever before suggested that in determining the law we ought to confine ourselves to the decisions that were cited in the district court") (emphasis added).[85]

In reaching this conclusion, the court disregards the Supreme Court's analysis in Gall. See, e.g., Gall, 552 U.S. at 56–57, 128 S. Ct. at 600–602, (reversing the Eighth Circuit because "[a]lthough [it] correctly state[ed] that the appropriate standard of review was abuse of discretion, it engaged in an analysis that more closely resembled de novo review of the facts presented" by, for example, concluding that the district court "gave too much weight to Gall's withdrawal from the conspiracy") (quotations omitted); United States v. Smart, 518 F.3d 800, 808 (10th Cir. 2008) (reversing precedent as inconsistent with Gall that had reviewed "de novo the weight assigned to various § 3553(a) sentencing factors because we considered this weighing process to be a

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[85] The court does not seem to be claiming that whether a fact is relevant, in the evidentiary sense, presents a question of law. Rather, the court says that a given fact's "importance," that is, weight, in deciding a § 3553(a) issue presents a question of law. See ante at 60 (explaining that the district court cannot write facts out of the record by ignoring them, even if it reflects the court's judgment that "those facts are not important" to the § 3553(a) inquiry).

question of law."). It also ignores this circuit's precedent—we have repeatedly held that "[t]he weight given to any § 3553(a) factor is within the sound discretion of the district court and we will not substitute our judgment in weighing the relevant factors." E.g., United States v. Amedco, 487 F.3d 823, 832 (11th Cir. 2007); United States v.Gardner, 363 Fed. App'x 688, 690 (11th Cir. 2010) (unpublished); United States v. Pertil, 344 Fed. App'x 569, 573 (11th Cir. 2009) (unpublished).[86]

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[86] Though the court is convinced that it is not committing the same mistake as the Eighth Circuit in Gall—conducting an inquiry of the § 3553(a) factors akin to de novo review—there are striking similarities between the two analyses. Compare United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006) ("First, the district court gave too much weight to Gall's withdrawal from the conspiracy because the court failed to acknowledge the significant benefit Gall received from being subject to the 1999 Guidelines."), rev'd 552 U.S. 38, 128 S. Ct. 586, and id. at 891 ("[T]he district court did not properly weigh the seriousness of Gall's offense. While the district court observed that Gall's offense level did not adequately reflect the offense conduct because it was based 'solely on drug quantity,' the district court ignored the serious health risks ecstasy poses."), with ante at 92–95 ("The facts about Irey as a husband, father, and member of the community are not disputed, the question is how to weigh them for sentencing purposes. . . . We would find grossly unreasonable, however, any suggestion that the credit Irey may be due for his family's feelings for him could even remotely approach the heavy weight stacked against him for the criminal acts he committed."), and ante at 123 ("With child sexual abuse of the kind that we know Irey is capable of and has committed . . . . [E]ven with an assumed low risk of recidivism following release in 15 years and 3 months, imprisonment for that length of time does not afford adequate protection from further crimes by him.").

Whatever the case, because questions of law are reviewed de novo even under the abuse of discretion standard,[87] the court does not give—or even think it owes—deference to the district court's § 3553(a) analysis. See ante at 44–45 ("Section 3553(a) plays a critical role in appellate review of sentences, just as it does in the initial sentencing decision" and the court of appeals must "apply those same factors in determining whether a sentence is reasonable.") (emphasis added).

The court purports to apply abuse of discretion because it will give some deference to a district court's conclusion. Specifically, the court notes that "[a] district court's sentence need not be the most appropriate one, it need only be a reasonable one" and because "we are to vacate the sentence if, but only if, we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors." Id. at 60, 62 (quotation omitted). But the line between "unreasonable" and "most appropriate" blurs. And it blurs quickly when the court conceives of its role as to conduct the § 3553(a) inquiry for itself and identify the range of sentences the district court could have reasonably imposed (as opposed to reviewing the district court's reasoning from its § 3553(a) factfindings to its conclusion). Once the court of appeals has independently identified what it believes is the range of permissible sentences

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[87] See Koon v. United States, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996) ("[W]hether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point.").

(explicitly or implicitly), appellate review becomes an inquiry into whether the district court's sentence falls within the range of sentences it, the court of appeals, would have imposed. This approach amounts to de novo review in the guise of abuse of discretion. See Curtiss-Wright Corp. v. Gen. Electric Co., 446 U.S. 1, 10, 100 S. Ct. 1460, 1466 (1980) (instructing that when conducting abuse of discretion review, the role of appellate courts is not to "reweigh the equities or reassess the facts but to make sure that the conclusions derived from [the district court's] weighings and assessments are judicially sound and supported by the record.").[88]

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[88] The court relies on United States v. Taylor, 487 U.S. 326, 108 S. Ct. 2413 (1988), for the proposition that courts of appeals must scrutinize a sentencing decision more closely because a sentence is arrived at by considering a number of statutory factors. Ante at 59–60 & n.15. In Taylor, though—which addressed only the issue of whether a district court abused its discretion by dismissing charges with prejudice when the Government committed a Speedy Trial Act violation—the Supreme Court specifically limited its analysis to whether the factfindings supported the decision to dismiss the charges with prejudice. The Court started with the district court's order—dismissing the charges with prejudice—and then looked to see whether the record supported that conclusion. Ultimately, because the district court did not fully explain its reasoning, the Court held that "[t]he District Court failed to consider all the factors relevant to the choice of a remedy under the Act. What factors it did rely on were unsupported by factual findings or evidence in the record." Taylor, 487 U.S. at 344, 108 S. Ct. at 2423. Finding insufficient support in the record for the district court's decision and refusing to conjure its own explanations, the Court held that the district court abused its discretion. Tellingly, the court did not conduct the Speedy Trial Act remedy inquiry for itself: It did not reach its own conclusions on the way each Speedy Trial Act

What is worse, the court does not confine its new analysis of the § 3553(a) factors to the evidence, arguments, and objections offered to the district court.[89]

In so doing, the court ignores well-established rules of appellate procedure and implicitly overrules

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factor cut and it did not decide whether the case should be dismissed with or without prejudice. Rather, because the decision is left to the district court's discretion, the court simply returned the question to it for reconsideration.

[89] The court contends that "much" of my criticisms on this score stem from the "faulty premise that the government made only a 'simple objection' that Irey's sentence is 'unreasonable.'" Ante at 138 n.44. With this mischaracterization of my position in hand, the court purports to defeat it by citing a number of our cases reaching the uncontroversial conclusion that a party need not repeat in the Jones colloquy arguments it had already made to the district court. See, e.g., United States v. Weir, 51 F.3d 1031, 1032 (11th Cir. 1995) (declining to apply the waiver rule when the district court "clearly understood the [party's] position and specifically rejected it.").

My criticism is different. It is true that a general objection will preserve more specific arguments a litigant actually made to the district court, id., but a general objection does not preserve specific arguments that a litigant never made. Here, for example, the Government did argue in general terms that only a 30-year sentence would be reasonable due to the seriousness of Irey's crimes. But the Government did not contend—as the court does today—that the good behavior credit would reduce Irey's sentence, or that such a sentence would amount to " less than four months for each of [Irey's] 50 victims." Ante at 103. Had the Government made these arguments and the others the court considers for the first time here, the district court may have imposed a different sentence. Since the Government did not, we may not consider them for the first time on appeal.

United States v. Jones, 899 F.2d 1097, 1102 (11th Cir. 1990) overruled on other grounds by United States v. Morrill, 984 F.2d 1136 (11th Cir. 1993) (en banc).[90] In Jones, this court explicitly ruled out considering new arguments and evidence in sentencing appeals. Thus, without explanation or apology, the court works a revolution in the rules governing the scope of review. The court's willingness to do so underscores that its conception of substantive reasonableness review bears no resemblance to traditional abuse of discretion review.[91]

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[90] Any conclusion that objecting to a sentence's "substantive unreasonableness" triggers the functional equivalent of a new sentencing hearing on appeal is tantamount to overruling Jones. Jones required that the district court have the first opportunity to correct its errors; an objection that a sentence is "substantively unreasonable" without explaining why does not give the court that opportunity.

[91] In United States v. Brown, 415 F.3d 1257 (11th Cir. 2005), this court discussed abuse of discretion review in another fact-heavy, individualistic context. There, the issue was whether expert testimony could be admitted under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993). This court explained in some detail the reasons for abuse of discretion review, most notably that the "rules relating to Daubert issues are not precisely calibrated and must be applied in case-specific evidentiary circumstances that often defy generalization" and that "we don't want to denigrate the importance of the trial." Brown, 415 F.3d at 1266. On appeal, this court did not reweigh the Daubert factors to determine whether the district court abused its discretion. Instead, this court explained that even though the expert evidence met only one of the four Daubert factors, we could not say that in this "particular

Instead, the court conducts a free-wheeling inquiry – conjuring new arguments and citing new evidence. With respect to § 3553(a)(1), for example, the court creates for the first time an argument that the district court's view of Irey as a victim "permeated" and "tainted" the court's weighing of the § 3553(a) factors, although the prosecutor never objected to the characterization of Irey as a victim. Ante at 80–81.[92] The court also argues, for the first time, that the district court clearly erred when it found that Irey's misconduct was "not purely volitional," and that even accepting the district court's finding on volition, the case would still fall in the heartland because almost all pedophiles are child molesters.[93] Id. at 84–87. To prove both of these

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situation" the district court abused its discretion, especially "given the heavy thumb—really a thumb and a finger or two—that is put on the district court's side of the scale." Id. at 1268.

The same should be true with sentencing. Sentencing decisions defy precise calibration and must be applied to the unique facts of specific cases. District courts are uniquely suited to make the judgment demanded by § 3553(a) and the parsimony principle, and reopening the record on appeal certainly diminishes the importance of the sentencing hearing.

[92] When I say "for the first time," I mean that these arguments were not made to the district court.

[93] I recognize, of course, that after the court explains why the finding was clearly erroneous, it states that it accepts the finding because the Government did not challenge it on appeal. But see ante at 84–85. If the court is truly accepting the finding, however, I do not understand why the court takes the time to conjure new evidence and arguments.

points, the court cites to expert evidence never offered to the district court.[94] See id. At 83, 87 (citing Bruce J. Winick, Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis, 4 Psychol. Pub. Pol'y & L. 505, 524 (1998), and Ryan C.W. Hall & Richard C.W. Hall, A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic

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It could be that though the court ostensibly accepts the district court's volitional finding, its explanation that it is clearly erroneous is very important to its analysis. The court ultimately concludes that the finding "cannot reasonably carry much weight" because, at least in part, it is clearly erroneous. Id. If the court really accepted that Irey's misconduct was "due in substantial part" to diminished capacity, id. at 85, it could not conclude—as it ultimately does—that the district court would have abused its discretion as a matter of law if it had imposed a sentence of even one day less than the statutory maximum. See id. at 137 ("Nothing less than the advisory guidelines sentence of 30 years, which is the maximum available, will serve the sentencing purposes set out in § 3553(a).").

In any event, my point is that when reviewing sentences, this court should not consider or conjure evidence and arguments that have never been offered to the district court. That is inconsistent with classic principles of appellate review and will cause immense damage to the institutional relationship we have with the district courts of this circuit.

[94] Though I label this expert "evidence," it is not technically evidence because it was not entered into the record. A more apt term might be "extra-record information." Vining v. Sec'y, Dep't of Corr., No. 07-15681, slip op. at 4 (11th Cir. June 28, 2010). Nevertheless, because it performs the function of evidence in the court's analysis, I refer to it as such.

Issues, 82 Mayo Clinic Proc. 457, 458 (2007)).

Nor did the Government ever argue, as the court does, that the district court clearly erred in finding that Irey had good character and had contributed positively to his family and community. See id. at 89–95 (contending that, categorically, anyone who commits the crime Irey committed and causes his family to lose its business and home cannot be a good family man and have good character). Nor did the Government argue to the district court that it should not have considered Irey's old age in his favor because to do so would reward him "for evading detection and it is unreasonable to do that." Id. at 96.

Similarly, in reweighing each of the § 3553(a)(2) purposes, the court conjured new arguments and cited new evidence never heard by the district court. Regarding the need for punishment, the Government never argued, as the court does, that the good behavior credit would reduce Irey's sentence to 15.5 years, which amounts to "less than four months for each of [his] 50 victims." Id. at 103. Nor did the Government argue that Irey's sentence does not reflect the seriousness of the offense because he received only 2.5 years longer than the 15 years he would have served had he taken one lewd picture of a 17-year-old girl. Id. at 104.

With respect to general deterrence, the court's entire analysis would be new to the district court. The Government never argued that the need for general deterrence is especially compelling in the child pornography context. But see id. at 108–12. The Government never pointed to Supreme Court cases underscoring that importance, or to appellate

cases reversing district courts for questioning the logic of general deterrence when pedophilia was involved. But see id.

The Government completely ignored specific deterrence at the sentencing hearing.[95] The Government never questioned, as the court does today, the district court's finding that a 65-year-old male would be too old for sexual activity from a "physiological standpoint." But see id. at 114–15. Obviously then, the Government did not cite to published opinions involving sex offenders over age 60 to make this point. But see id. at 115–16. Nor did the Government enter expert evidence about the comparatively high recidivism rates of older sex offenders. But see id. at 117 (citing Mark Motivans & Tracey Kyckelhahn, Federal Prosecution of Child Sex Exploitation Offenders 2006, Bureau Just. Stat. Bull., Dec. 2007 for the proposition that 7.3% of all sex offenders are over 60, and Ryan C.W. Hall & Richard C.W. Hall, A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensics Issues, 82 Mayo Clinic Proc. 457 (2002), for the proposition that up to 44% of pedophiles were in the older adult range (age 40 to 70 years) and that pedophiles "offend in their later years at a greater rate than other sexual offenders").

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[95] In fact, the Government stipulated that Irey fell into criminal history category I, which in essence means the Government stipulated that no prison time beyond that called for by his offense level was needed for specific deterrence. Accordingly, the Government never argued, for example, that Irey's criminal history category under-represented his potential for recidivism.

Still on specific deterrence, the Government never argued that a lifetime of supervised release would be insufficient to protect the public by pointing to Bureau of Justice statistics, other expert evidence, and cases demonstrating that it is possible to recidivate when under supervision. But see id. at 118–21 (citing Bureau of Justice Statistics, Dep't of Justice, Federal Criminal Justice Trends, 2003, (2006); Loretta J. Stalans, Adult Sex Offenders on Community Supervision: A Review of Recent Assessment Strategies and Treatment, 31 Crim. Just. & Behav. 564 (2004); James L. Johnson, Sex Offenders on Federal Community Supervision: Factors that Influence Revocation, Fed. Probation, June 2006; Patrick A. Langan et al., Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994 (2003); 2009 Annual Report of the Director: Judicial Business of the United States Courts (forthcoming spring 2010); Protecting Our Nation's Children from Sexual Predators and Violent Criminals: What Needs to Be Done?, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. 30 (2005) (statement of Fred S. Berlin, M.D., Associate Professor, Johns Hopkins University)).

Finally, with respect to § 3553(a)(6), the Government never argued that Irey's sentence would produce unwarranted disparity. Obviously, then, it never cited twelve cases for the proposition that the defendants in those cases committed a less serious crime than Irey but received a more serious sentence. Id. at 130–34.

If the court's analysis leaves any doubt that the court has assumed the role of resentencer, its

conclusion removes it. After conducting the functional equivalent of a new sentencing hearing, the court concludes that "[n]othing less than the advisory guidelines sentence of 30 years, which is the maximum available, will serve the sentencing purposes set out in § 3553(a)." Id. at 137. Accordingly it vacates Irey's sentence and remands the case with the instruction that the district court impose a sentence of 30 years' confinement. Id. at 140–41. With this unprecedented step, it is indisputable that the court has resentenced Mr. Irey.[96]

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After today's opinion, it is the law of this circuit that a party who is disappointed by the sentence the district court has imposed may apply to this court for resentencing.[97] Except for live

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[96] Though we have reversed sentences on substantive reasonableness grounds before, we have never ordered the district court to impose a particular sentence. See, e.g., United States v. Livesay, 587 F.3d 1274, 1278–79 (11th Cir. 2009) (vacating a sentence and instructing that imprisonment was required but leaving the length of the term to the district court's discretion); Pugh, 515 F.3d at 1204 (remanding without stating what the sentence should be); United States v. Martin, 455 F.3d 1227, 1241–42 (11th Cir. 2006) (same); Crisp, 454 F.3d at 1291–92 (same).

[97] In this case, the Government is the disappointed party. But suppose the defendant were the disappointed party, claiming that the sentence the district court imposed was so severe as to be "unreasonable." If the defendant had sandbagged the district court by withholding evidence that mitigated the need for punishment and by failing to cite the sort of published authorities cited in the court's opinion, we would not consider the withheld evidence and published

testimony, the disappointed party can brief evidence never offered and arguments never articulated to the district court. From its new vantage point, this court will then second-guess the district court's sentence. We will determine the range of objectively correct sentences based on the new facts and new arguments; if the sentence handed down by the district court falls outside of that range, we will reverse. Sometimes, that range could be a single point. Here, the court holds that any sentence other than 30 years' imprisonment would constitute an abuse of discretion—if the district court had sentenced Irey to 29 years, 11 months, and 29 days, it would have abused its discretion as a matter of law.[98] The court is not taking the abuse of discretion

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authorities (because we do not consider matters not presented to the district court) unless we invoked the plain error doctrine.

[98] Not only is the court's approach inconsistent with abuse of discretion review, it also risks reintroducing the constitutional infirmity cured by Booker. In short, the court's approach turns the appellate court into the post-Booker Sentencing Commission: rather than the Commission's Guidelines, the court of appeals will determine the bounds of a district court's discretion by identifying the range of "reasonable sentences" for a given set of facts.

Pre-Booker, the mandatory Guidelines set the Apprendi statutory maximum because, based only on the facts reflected by a jury verdict, a defendant could be sentenced to no greater than the sentencing range identified for his base offense level and criminal history category score. A defendant could receive a higher sentence if—but only if—the district court found facts to support specific offense characteristics or adjustments by preponderance of the evidence. This was true even though district courts could

disregard the Guidelines in extraordinary circumstances, because in "most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible." United States v. Booker, 543 U.S. 220, 234, 125 S. Ct. 738, 750 (2005). This was also true even though the district court had virtually unfettered discretion to sentence a defendant within the range identified by the mandatory Guidelines.

Transforming the Guidelines from mandatory to advisory cured the Sixth Amendment violation because the Court had "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." United States v. Booker, 543 U.S. at 233, 125 S. Ct. at 740. Thus, a defendant risked any sentence along the statutory range, so long as the district court did not abuse its discretion. Because the district court's authority to exercise "broad discretion" to sentence offenders along the statutory range is what allows the Booker remedy to cure the Sixth Amendment violation of mandatory Guidelines, and because appellate review is the check on that authority, properly defining the scope of appellate review is essential.

Giving proper content to appellate review is the key to assuring that the advisory-Guideline remedy actually rights the Sixth Amendment wrong identified by Booker. If appellate review is too stringent, it will carve up statutory sentencing ranges in exactly the same way the Sentencing Commission's mandatory Guidelines did. For example, suppose the statutory range for a particular crime is 5 to 40 years' imprisonment. Suppose that in one case, the appellate court decides that for any defendant who commits the crime under X facts, the district court would necessarily abuse its discretion unless it imposed a sentence of at least 10 years' imprisonment. Suppose that in another case, a defendant commits the same crime, again under X facts, and the appellate court decides that the district court would necessarily abuse its discretion if it imposed a sentence above 20 years' imprisonment. After those two decisions, the court has created a sentencing range that is identical in

all relevant respects to a mandatory-Guidelines sentencing range: as a matter of law, a defendant who violates the crime under X set of facts must receive a sentence of somewhere between 10 and 20 years' imprisonment. If the defendant did not admit all of the facts, then the district court would base that sentence on judge-found facts by a preponderance of the evidence. The district judge would then have unfettered discretion to sentence a defendant who commits the crime under X facts from between 10 and 20 years, but would have no discretion to sentence beyond that range (just as the district judge had unfettered discretion to sentence within the range of sentences identified by the mandatory Guidelines).

Today, the court takes a step in this direction. The court conceives of its role as to determine what range of sentences is "reasonable." In other words, the court is deciding as a matter of law the bounds of the district court's discretion within the statutory range on the particular set of facts contained in this record. The court concludes that under the facts of this case, Irey must be sentenced to no less than 30 years' imprisonment or the district court would necessarily abuse its discretion. If we follow the court's approach and declare what range of sentences is objectively "reasonable" based on our own assessment of the § 3553(a) factors in light of a particular set of facts, we will, over time, carve up statutory sentencing ranges to the point that it will be possible to identify the maximum sentence that can be imposed based solely on the facts embodied in the jury verdict. In fact, after today, I fail to see how a district court could impose a sentence of less than 30 years for a materially similar defendant. Once that occurs, this court will have reintroduced the Sixth Amendment violation supposedly cured by Booker.

The standard of review I set out in part II.E, supra, gives meaning to appellate review of sentences while avoiding this result as much as possible. Under my approach, this court is not in the business of reweighing all of the facts in the record, conducting a § 3553(a) inquiry de novo, and declaring a range of sentences that is objectively

standard seriously.

B. Institutional Harm

The court's willingness to resentence does immense and immeasurable institutional damage. "'It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.'" Gall, 552 U.S. at 52, 129 S. Ct. at 598 (quoting Koon v. United States, 518 U.S. 81, 113, 116 S. Ct. 2035, 2053 (1996)). The district court is unquestionably the best judicial actor to conduct this "unique study" and to undertake the open-ended and fact-heavy § 3553(a) inquiry. See, e.g., Gall, 552 U.S. at 51–52, 129 S. Ct. at 597–98 (explaining that the district court is in a "superior position to find facts and judge their

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correct or "reasonable." Rather, under my approach, when we reverse a sentence on substantive grounds, we are simply holding that under the non-clearly erroneous facts found by the district judge and in light of the district judge's explanation, no rational judge could have imposed that sentence. We would not hold as a matter of law that on a given set of facts, only a sentence of at least so-many years' imprisonment is reasonable. Nor would we decide the import of particular facts to the § 3553(a) inquiry for all time; for example, we would not hold, as the court does, that pedophilia-as-diminished-capacity can never form the basis for a downward departure in a sex crimes case. Such a standard gives district judges maximum discretion to sentence a defendant anywhere along the statutory sentencing range and thus is more consistent with the remedy fashioned by the Supreme Court in Booker.

import under § 3553(a) in the individual case" because it looks the defendant and witnesses in the eye, gains insights not conveyed by the cold record, and has extensive sentencing experience) (quotation omitted). The district court's effective use of its expertise, however, turns on the active participation of the lawyers—the prosecutors and defense counsel—in the adversary proceeding envisioned by Rita and Gall and fleshed out by my opinion today. Their professionalism is vital to the sentencing process. Indeed, if sentences are to inspire the confidence of the defendant and the public, the sentencing hearing in the district court must be the "main event," rather than a "tryout on the road" for the real forum that will determine the sentence. Wainright v. Sykes, 433 U.S. 72, 96, 97 S. Ct. 2497, 2508 (1977).

Today's decision sends the unmistakable message that the district court is nothing but a tryout on the road. This diminishes the district courts' institutional role in the eyes of the public and the legal profession because it de facto strips the district courts of their Congressionally given authority.[99] If the district court procedure is merely

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[99] In this case, the Government participated in the diminishment through the prosecutor's failure to present a robust sentencing argument to the district court and failure to adequately call attention to the mistakes she believed the district court made. Defense counsel are required by the Sixth Amendment to perform at the highest professional level and to treat the sentencing hearing before the district court as the main event. If defense counsel's performance is wanting, counsel may have to answer for it in a collateral proceeding alleging a violation of the defendant's Sixth Amendment right to the effective assistance of counsel. The prosecutor, however, does not run the risk of having to

a tryout, a busy district court may be inclined to pay mere lip service to its § 3553(a) duty and simply impose a Guidelines sentence;[100] after all, its sentence would only be tentative, subject to second-guessing on appeal. And even if the district court wanted to do its duty, the prosecutor may not present the government's best case to the district court—better to wait and see what sentence the court imposes before expending the government's resources.[101]

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answer to a district judge in a collateral proceeding on a charge of inept performance.

[100] This would not only flout the Congressional command embodied in § 3553(a), it would also deny justice for either the United States or the defendant. If the facts and circumstances of the case call for a sentence outside the Guidelines sentencing range to satisfy the § 3553(a)(2) purposes of a federal sentence—and they often will—the sentence will not be tailored to the unique facts before the court, will not serve the parsimony principle, and will work an injustice on one of the parties.

[101] District courts' tendency to impose sentences within the Guidelines range worsens this already perverse incentive. This circuit's district courts imposed Guidelines sentences in 65.6% of the cases from October 1, 2008 through September 30, 2009. See United States Sentencing Commmission, Sourcebook of Federal Sentencing Statistics, tbl. 26 (2009). The court's approach gives the government every incentive to rest on the Guidelines and put on no § 3553(a) evidence before the district court (as the government frequently does). In the infrequent event that the district court imposes a below-Guidelines sentence, the government would lose nothing because it could make its § 3553(a) case for the first time before the court of appeals.

The court's willingness to ignore time-honored contemporaneous objection and procedural default rules diminishes the status of the district courts for another reason.[102] These rules are designed to force the parties to give the district court everything it needs to make sound decisions and the first chance to fix any errors. This, in turn, leads to an enhanced quality of judicial decision making, preserves the sentence's finality, and may prevent unnecessary appeals. The court's message to the prosecutors in this circuit is: don't bother, there is no need to try to put the district court in the best position to make decisions.

Sadly, our approach today diminishes the district court's role for no good reason. It transfers sentencing authority from district judges to the courts of appeals, which lacks the district judges' experience and expertise in imposing criminal sentences. As the length of today's opinion shows, even attempting to duplicate the district judge's § 3533(a) task requires a huge investment of this court's resources. Despite the huge investment, there is no real return: due to our lack of experience and expertise, we are poorly suited to the job and will not infrequently reach a wrong result. Moreover, our fact-intensive resentencing decisions will be

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[102] Jones, after all, is simply an application of the contemporaneous objection rule to the sentencing context. Sentencing is unique because the district court is not bound by the evidence, the parties' proposed findings and conclusions, and the parties' arguments at the close of the hearing. If the district court bases the sentence on findings or arguments not articulated at the sentencing hearing, the parties must have an opportunity to object to the court's findings and conclusions and obtain the correction of any error the district court may have made.

incapable of generalization and will hinder our ability to establish clear guidance for the district courts of our circuit. See Koon v. United States, 518 U.S. at 98–99, 116 S. Ct. at 2046–47; see also Buford v. United States, 532 U.S. 59, 65–66 121 S. Ct. 1276, 1281 (2001) (explaining that if the question presented "grows out of, and is bounded by, case-specific detailed factual circumstances," then the "value of appellate court precedent" is limited). Lastly, as we fritter away our resources on sentencing appeals, other litigants in the appellate queue will suffer.

This court is not well-suited to sentence offenders for another and even more important reason. The Supreme Court has made abundantly clear the crucial role that process plays in sentencing. See Gall, 552 U.S. at 49–50, 128 S. Ct. at 596–97. The public's and the defendant's confidence in the justice of a sentence turn on how the sentencer arrived at it. Given the strictures of appellate review, it is impossible for us to accord a defendant the process that is due. See e.g., Fed. R. Crim P. 32(i). When this court resentences a defendant, it deprives him of a meaningful hearing in which he has the right to address a judge who can look him in the eye before deciding his fate. See Fed. R. Crim. P. 32(i)(4)(A)(2)(ii). Because the defendant's first notice of the reasons for the resentence and its factual bases is provided by this court's opinion imposing the sentence,[103] he is deprived of the right

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[103] That the Government's brief cites evidence and advances arguments not presented to the district court in the first instance is of no moment. Defense counsel would assume that this court, adhering to its time-honored rule that matters not presented to the trial court will not be considered, Dupree v. Thomas, 946 F.2d 784, 793 (11th Cir.

to object to the reasons and factual bases.[104] And, crucially, it deprives him of a right to appeal. Such treatment of a litigant not only breeds disrespect for the rule of law, but also raises serious due process concerns. See Gardner v. Florida, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207 (1977) (plurality opinion) (concluding that the due process clause was violated when "the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain").

In sum, when placed on a balance sheet, the grave institutional harm caused by the court's approach significantly outweighs any benefit the approach might yield.[105] Resentencing defendants on appeal diminishes the role of the district court in the eyes of the legal profession, and it diminishes the public's confidence in the district courts as an institution for administering criminal justice. It misallocates and gobbles up judicial resources.[106]

1991), would refuse to entertain the evidence and arguments, and thus would not waste precious briefing space to respond.

[104] The defendant would have the right to petition the court for rehearing, but a rehearing petition does not perform the same service a post-sentence objection would provide in the district court.

[105] The only benefit that comes to mind is finality. In resentencing the defendant, we make his sentence final and bring his case to a close.

[106] The court acknowledges that we have reviewed hundreds of cases for substantive reasonableness since Booker was decided, but minimizes the impact of its decision by pointing out that the Eleventh Circuit has only reversed sentences in four of these cases. See ante at 61. After today's decision, however, we may see more sentence appeals because any dissatisfied party can ask this court to

None of this is necessary.[107] If a sentence constitutes an abuse of discretion, we should simply say so and return the case to the district court, the appropriate forum for the main event.

V.

For the foregoing reasons, I would vacate Irey's sentence and remand to the district court for resentencing.

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resentence the defendant based on information favorable to its position that the district court presumably ignored by neglecting to mention the information in stating its reasons for the sentence. And with the precedent that we can consider evidence not in the record and make new arguments for or against a party on appeal, we may see more sentences vacated—or defendants resentenced. The court's decision could affect many of the hundreds of sentencing appeals we will see in the years to come.

[107] The court claims that if Irey's sentence is reasonable, then any sentence is reasonable and that would return us to the pre-SRA days where a district judge was a "law unto himself or herself." See ante at 137 (quotation omitted). These arguments do not justify the court's approach of resentencing Irey. First, we can say that Irey's sentence is unreasonable and set it aside under classic abuse of discretion review—we need not resentence Irey to solve the reasonableness concern. Second, we need not worry about a return to the pre-SRA days given the post-Booker requirements that district judges exercise their sentencing discretion only after conducting a formal process, applying statutory factors, and explaining their rationale—which is then subject to appellate review for abuse of discretion.

EDMONDSON, Circuit Judge, dissenting, in which BIRCH, BARKETT, and MARTIN, Circuit Judges, join:

The limit that the law places on the right use of appellate court power to interfere with the sentencing decisions of United States District Judges (who, of course, have --under the law --powers of their own) is, for me, what this appeal is about. The specific case before us involves a serious crime and ghastly conduct -"horrific" in the District Judge's words --on the part of Defendant. And, no party has contended that the District Judge, in imposing the sentence, made a significant procedural error.[1] The government prosecutors (who bear the burden of showing reversible error) contend that the sentence imposed in district court is too lenient and that no sentence would be lawful except the maximum sentence of imprisonment that the pertinent criminal statute will allow: 30 years.[2]

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[1] Only a case without a substantial procedural error is in my mind as I write this dissent.

[2] Because of the interplay of the Guidelines and the pertinent criminal statute, the Guidelines (which the District Judge recognized as a sentencing factor) called, in this case, for 30 years' imprisonment. But the Guidelines are not mandatory as everyone knows. See, e.g., Nelson v. United States, 129 S. Ct. 890 (2009) (reversing Fourth Circuit and stressing that "Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable" by sentencing courts.); Spears v. United States, 129 S. Ct. 840 (2009) (reversing Eighth Circuit and upholding a below-Guidelines sentence in crack cocaine case based entirely on sentencing District Judge's policy disagreement with Guidelines).

The issue is not whether federal appellate judges ought to do their duty. They must. And the issue is not whether appellate courts can review sentences and sometimes correctly set them aside, even when the sentence was imposed without procedural errors. They can. Appellate judges do have some legitimate power to review the substance of sentences: that is, to determine whether a District Judge has imposed a sentence that is either too lenient or too harsh as a matter of law. The general question presented here is what is the limit, under the law, on the power of appellate judges in deciding such reviews.

The legal limit on the power of appellate judges to interfere with sentences imposed by District Judges is staked out by the standard of review. In Gall v. United States, 552 U.S. 38, 128 S. Ct. 586 (2007), the Supreme Court --in the course of reversing an appellate court judgment that had overturned a district court's sentence as too light[3] -

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[3] In reversing the District Judge's far-below-the-Guidelines sentence, the Eighth Circuit in Gall had studied the record and opined that the District Judge in sentencing had given "too much weight" to X, "did not properly weigh" Y, given "too much emphasis" to Z, and so on. The Supreme Court said, "Although the Court of Appeals correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an analysis that more closely resembled de novo review of the facts presented and determined that, in its view, the degree of variance [from the advisory guideline] was not warranted." Gall, 552 U.S. at 56, 128 S. Ct. at 600.

Although the Eighth Circuit vacated the sentence imposed by the district court and remanded for resentencing, the Eighth Circuit did not set a precise sentence to be imposed on Mr. Gall on remand.

set the standard of review: we only look to see if the sentence is reasonable in the light of a "deferential abuse-of-discretion standard." Id. at 40, 128 S. Ct. at 591.

This standard of review promotes (among other things) finality in criminal cases. But the deferential abuse-of-discretion standard was selected mainly to recognize that the Sentencing Guidelines are advisory only and a District Judge must not presume that the sentence indicated by the Sentencing Guidelines is a reasonable sentence for the convicted person standing before the District Judge: the District Judge must make for each convicted person "an individualized assessment based on the facts presented." Gall, 552 U.S. at 50, 128 S. Ct. at 597. Thus, sentencing is a fact-bound determination. When the Supreme Court laid down the law, the Court pointed out that a District Judge "is in a superior position [relative to an appellate court] to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." Id. at 51, 128 S. Ct. at 597 (internal quotation omitted and emphasis added).

In sentencing, a District Judge is to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in" 18 U.S.C. § 3553(a)(2). (emphasis added).[4]

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[4] The sentence imposed needs

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

In my view of the law, a District Judge's decision on what sentence to impose is essentially a fact finding, especially as here where witnesses testified at the sentencing hearing: oral evidence particularly raises issues of credibility. Consider Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401-02, 110 S. Ct. 2447, 2459 (1990) (discussing deferential standard of review for sanctions imposed under Fed. R. Civ. P. 11 as one to review a fact-intensive question). And "[w]hen an appellate court reviews a district court's factual findings, the abuse-ofdiscretion and clearly erroneous standards are indistinguishable: . . ." Id. at 401, 110 S. Ct. at 2458.

The clearly erroneous/deferential abuse-of-discretion standards deprive the appellate court of the authority to reweigh conflicting evidence and to reconsider facts already weighed and considered by a district court. See Cooter & Gell, 496 U.S. at 400-04, 110 S. Ct. at 2458-60; see also Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 857-58, 102 S. Ct. 2182, 2190 (1982). As I grasp it, the deferential abuse-of-discretion standard (while certainly no "any evidence" rule or scintilla rule) calls for nothing more than some reasonable basis in the record for the District Judge's decision. Because the standard prohibits appellate judges from making their own determination of where the weight of the evidence lies, the law greatly restrains the maneuvering room of appellate courts. The restraint flows directly from the deferential abuse-of-discretion standard of

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(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

review chosen for us by the Supreme Court. I submit that an appellate court's reweighing of the evidence or giving the facts a different construction --to grant something in the record more or less value than the District Judge did and so to conclude that the record overall weighs more heavily for a higher sentence -- smacks of a kind of de novo review à la the Eighth Circuit's approach in Gall: the appellate court oversteps its authority.

Appellate courts can set aside a sentence as too lenient to be reasonable as a matter of law. But appellate courts first need to ask only one question: could an objectively reasonable District Judge looking at the record "on the whole" have found the ultimate sentence imposed to be a "sufficient" one, when the record (including all the evidence and reasonable inferences and credibility evaluations) is viewed in the light most favorable to the sentence. If the answer is "Yes," the appellate courts can correctly do nothing but affirm the sentence. This deferential standard limits severely the authority of appellate judges to interfere with sentences, even when the appellate judges --giving more or less weight to one circumstance or another --think the sentence, in an immediate case, is not "just" or not the most "just."

On the other hand, this standard of review -- because it demands some objective, reasonable basis in the record --guards against true arbitrariness and stops short of allowing District Judges the freedom to sentence simply as they please. The deferential abuse-of-discretion standard of review acknowledges that sentencing is about marshaling the facts and applying the fact-dependent legal criteria set out by 18 U.S.C. § 3553(a). The pertinent standard places

the main responsibility and legal power for sentencing squarely on United States District Judges whose business is fact finding; this standard very greatly restricts the authority of appellate judges to interfere, although the appellate judges would have definitely imposed some other sentence. "[I]t is not for the Court of Appeals to decide de novo whether . . . the sentence [is] reasonable." Gall, 552 U.S. at 59, 128 S. Ct. at 602. "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." Id. at 51, 128 S. Ct. at 597.

Turning to the facts of the particular case before us, I conclude that the experienced District Judge did not abuse his discretion in deciding that 17.5 years of imprisonment plus a lifetime of supervised release was a sufficient sentence given all the circumstances. That this serious crime deserves a substantial term of that most American judges (I hope all of them) would accept that 17.5 years of imprisonment is beyond debate (and, in reality, has never been debated). I trust imprisonment is a substantial term of imprisonment.[5] And it is years

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[5] Defendant might actually serve something less than 17.5 years because the Executive Branch, over the years, "may" award him some limited credit toward service of his sentence if the prison administrators determine Defendant has "displayed exemplary compliance with institutional disciplinary regulations." See 18 U.S.C. § 3624(b)(1). How much credit Defendant will actually be awarded in the uncertain future is highly speculative. For review purposes, it seems best to me to treat a sentence imposed by a district court -- in this case, 17.5 years plus a lifetime of supervised release -- as a fixed sentence. I believe this approach has been our custom.

beyond the statutory minimum sentence for the only crime with which Defendant was charged.[6]

The government says that nothing but 30 years of imprisonment would be a lawful sentence in the circumstances of this case. I cannot agree with that legal conclusion. First, I think the argument belittles the punishment involved in a lifetime of supervised release that follows a substantial term of imprisonment. The Supreme Court, in Gall, made it plain to me that supervised-release punishments count --under the law --as real punishments and must not be treated by appellate courts as nothing or, at least, nothing significant when sentences are being reviewed. See id. at 48-49, 128 S. Ct. at 595-96. Second, the record in this particular case contains many things that, I accept, would allow (that is, provide an adequate evidentiary/factual basis for) an objectively reasonable judge to back off the absolute thirty-years-imprisonment maximum sentence.

It is undisputed that Defendant surrendered after being indicted, plead guilty, and expressed remorse. He accepted responsibility and relieved the Government of the trouble and expense of a trial.[7]

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[6] The government only charged Defendant with one count of production of child pornography per 18 U.S.C. § 2251(c). Other cases involving longer sentences in child pornography cases involved either prior criminal convictions or more counts or both.

[7] Contrast United States v. Kapordelis, 569 F.3d 1291 (11th Cir. 2009), where defendant - a medical doctor charged, among other things, with producing pornographic images of underage boys (including one underage boy who was his near relative and another underage boy who had

After surrendering and posting bond, he entered into a residential treatment center: a step toward rehabilitation. It is also undisputed that Defendant has no prior criminal convictions. Furthermore, Defendant did not obstruct justice and, to the contrary, cooperated with the government providing information about the nature of his offense (time, places, identity of others with whom he dealt and so forth). These kinds of things have traditionally and commonly been reflected in a lessening of a sentence from what it would have otherwise been. In the context of the full record, these things provide a reasonable basis for the sentence in this case to be less than the maximum allowed by the statute.

Moreover, at the sentencing hearing in district court, the Defendant stood before and spoke to the judge who would impose the sentence upon him; and Defendant presented witnesses on his behalf: this case is an oral-evidence case. The government presented no witnesses. Several friends and family members testified to Defendant's characteristics generally and history of good works as an employer, parent, and so on and to their own loyalty and support of Defendant, as a human being who was in disgrace and in trouble. I appreciate that this kind of humanizing testimony raises a familiar debate about whether it is possible for character to be compartmentalized so that a person who is weak (or

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been the doctor's patient: defendant had seemingly drugged the boys first) -- insisted (despite powerful photographic evidence against him) on a trial by jury and, at his sentencing, never accepted responsibility, and called prosecutors "liars" and compared them to Hitler; and the district court found the defendant would not likely be rehabilitated given "his attitude and lack of remorse."

wicked) in must be viewed holistically so that a person's weak or wicked character in one context produces a reliable conclusion in every context. This familiar debate has been taken up by Aristotle and Kant and other Greats. And I doubt the power of a Court of Appeals to resolve it as a matter of law. Whatever I personally might think about this family-and-friend evidence, the District Judge in this case had the legal right to determine the credibility of the witnesses before him and to give the testimony the weight that he did.[8] Given the entire record, this evidence was reasonable evidence to support a sentence less than the maximum sentence allowed by the pertinent statute.

In addition, at the sentencing hearing, Defendant presented an expert witness: Dr. Shaw. The government did not; and the government did not object to the expertise of the Defendant's expert witness. The expert never suggested (nor has anyone else) that Defendant was not guilty on account of some mental disorder. But the mental health expert did testify that this Defendant was afflicted with a recognized mental disorder: heterosexual pedophilia. The expert testified that this disorder was not something that Defendant had chosen to have, but was something that was "within" Defendant (something "natural biological") and caused Defendant to have a tendency toward being

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[8] I think it was Robert Frost who said that "there are tones of voice that mean more than words." A District Judge hears those tones. Furthermore, a District Judge sees the witness's demeanor as well as hears the testimony. I submit these opportunities are big advantages when it comes to fact finding.

attracted to sexual behavior with prepubescent children. (This evidence, I submit, supports the District Judge's reference to Defendant as a "victim": in the sense of a victim of the circumstance of Defendant's own biology.) The expert also testified that the disorder was treatable, that this Defendant was amenable for treatment, that Defendant's aging[9] --a reduction naturally in testosterone and a reduction naturally in sex drive – would likely be helpful to his treatment, and that Defendant was not likely to be a recidivist. The District Judge who saw

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[9] Defendant was 50 at the time of sentencing. According to the Census Bureau, a white male of 50 would typically have a life expectancy of less than 30 years. See U.S. Census Dep't., 2010 Statistical Abstract, Table 103 (available at http://www.census.gov/compendia/statab/2010/tables/10s0103.pdf). A 30-year maximum sentence then had a realistic likelihood of being, in fact, life imprisonment for this Defendant. Congress, in 18 U.S.C. § 2251(c) -- the statute of Defendant's conviction -- does not call for life imprisonment as a statutory punishment. (Taking into account life's uncertainty, I understand that any term of imprisonment might turn out to be actually life imprisonment; but, in reality, some sentences of years are, for some defendants, more likely to be life sentences than other sentences for other defendants. This reality of human age seems all right to consider, although never would I contend that persons aged 50 or older are, as a matter of law, exempt from a 30year term of imprisonment under the pertinent statute.) The District Judge thought that Defendant's age was pertinent to sentencing, especially Defendant's advanced age upon his release from imprisonment. I accept that the circumstance of Defendant's age was a permissible, reasonable basis, in conjunction with everything else, for a sentencing court to impose a sentence of less than the maximum on this Defendant.

and heard this expert witness could credit the evidence. Given the entire record, this evidence is reasonable evidence to support a sentence of less than the maximum allowed by the statute.

Of course, a number of elements make up the total record. Still, while I accept that other facts and evidence (some of it conflicting) are in the record, I think what I have summarized is legally enough to justify --I do not say compel -an objectively reasonable judge to find that a sentence of less than the 30 years of imprisonment would be sufficient.

However I might have judged the weight of the evidence and facts in my own reckoning of the best sentence, I accept that the record as a whole was sufficient to allow --as a matter of law --the imposition of something less than the maximum sentence. Imponderables are involved, and a District Judge has unique access to and familiarity with the individual defendant. Here, the sentencing District Judge thought out and selected a sentence for this case that involved a substantial period of imprisonment, including a period of years (not hours, weeks or months, but years of imprisonment) above the statutory minimum. Then, to follow the term of imprisonment, the sentencing judge imposed a lifetime of supervised release with many special conditions[10] : a "substantial restriction of freedom" as the Supreme Court put it in Gall. Gall, 552 U.S. at 48, 128 S. Ct. at 595.

The sentencing range under the one statute involved is not very wide: only 15 years from the minimum sentence (15 years) to the maximum

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[10] The list of conditions of supervised release was long and tailored for someone like Defendant.

sentence (30 years). Cf., e.g., 18 U.S.C. § 2422(b) (a sexual offense allowing for imprisonment of ten years to life); 21 U.S.C. § 841(b)(1)(A) (a drug offense allowing for imprisonment of ten years to life). So, the room for the exercise of sentencing discretion is markedly controlled from the start by the statutory range set by Congress; therefore, it seems to me that it is harder for a sentencing judge to go far off the rails. This observation seems even clearer to me where, as here, the District Judge did impose a lengthy sentence of imprisonment: not the maximum, but neither did he impose the minimum sentence (or something that was merely hours, weeks, months, or only one year beyond the minimum).

I think the record would support a variety of lawful sentences, including some sentences heavier than the one actually imposed. Nevertheless, the government's prosecutors have failed to demonstrate to me that there is no legitimate basis for the district court's actual sentencing decision. All things considered and applying the deferential abuse-of-discretion standard, I cannot conclude that the sentence imposed was beyond the outside borders of reasonable. For more background, see United States v. Irey, 563 F.3d 1223 (11th Cir. 2009) (vacated for rehearing en banc).

In the federal judicial system, I believe that the district courts have duties and powers --mainly about fact finding and about weighing in the balance some facts against others --that are theirs and not ours. I believe that one of the important duties of appellate judges is to allow District Judges room to carry out the duties of District Judges. I believe the deferential abuse-of-discretion standard set out and

applied in Gall was intended to buttress the district courts' sentencing powers and to limit the appellate courts' powers to recast what is essentially a factual issue into a question of law. Given these principles, I believe it is jurisprudentially important to steer clear of de novo review, or something resembling it, in an appeal about the substantive-reasonableness of a sentence. Considering this record and all, I would defer to the District Judge's decision and affirm the sentence in today's case.

I dissent with respect and not without regret.

BIRCH, Circuit Judge, dissenting:

The time-worn adage in jurisprudence that hard facts often lead to bad law is certainly applicable to this case. I have little doubt that had I been the sentencing judge I might well have fashioned a different and harsher sentence for this defendant. But the decision at play here is the respective roles of the appellate court and the sentencing court. Our appellate role is properly constrained by the standard of review to which we are required to adhere. As Judge Edmondson persuasively describes the application of that standard to the record, it compels an affirmance of the sentencing court's judgment in this case. Accordingly, I respectfully dissent and join in the dissenting opinions of Judge Edmondson and Judge Barkett.

BARKETT, Circuit Judge, dissenting, in which BIRCH and MARTIN, Circuit Judges, join:

I agree with just about everything in Judge Edmondson's dissent. If there is any point of departure, it is the addition (or clarification, in my view), that the district judge must articulate the reasons for the sentence imposed based on the evidence in the record. Because the record may support a number of reasonable sentences, this articulation is necessary so that the appellate court can be satisfied that the district judge actually considered how all of the § 3553 factors relate to the defendant's individual case.

I previously explained why it is important for district judge's to give reasons in my dissent in United States v. Docampo, 573 F.3d 1091 (11th Cir. 2009).

First, Congress explicitly mandated the articulation of reasons:

> Congress requires the district court to "state in open court the reasons for its imposition of the particular sentence," § 3553(c), and before doing so, the court must consider each of the factors delineated in § 3553(a) to arrive at the appropriate sentence.

Docampo, 573 F.3d at 1106. Second, not every case requires an elaborate explanation:

> What is "enough" or "adequate" depends upon the circumstances of the particular case at hand[] . . . . [L]ess may be required if a case is "simple" or "typical." The logical corollary of

this conclusion, however, is that more is required when a judge is faced with an atypical case or the defendant argues that a departure from the Guidelines is warranted.

....

. . . Thus, while a mechanical discussion of each § 3553(a) factor may not be necessary in every case, a district court has a responsibility to analyze the relevant factors on the record. These would include a particular § 3553(a) factor raised by a defendant, or one clearly implicated by the specific facts of that case . . .

.

Moreover, the sentencing judge should be able to articulate the rationale that justifies the actual number of months or years that make up a defendant's sentence, whether that number is within or outside the Sentencing Guidelines. A reasonable sentence is one for which there is an explanation of how the particular length of the imposed sentence corresponds to the individual sentencing needs of the particular defendant. For example, how does a sentence of fifteen years, as opposed to a sentence of five or ten years, or twenty-two years for that matter, serve the needs of individual and general deterrence while also addressing the nature of the crime and the individual characteristics of the defendant in a given case? The number of years cannot be determined simply by an individual judge's gut feeling. As a society that values due process, we must have some rationalization for every step of our judicial system. There should be a transparent,

> logical, and reasonable justification to support the amount of jail time prescribed for a particular defendant based on the § 3553 factors.

Id. at 1106-08, n.7.

Here, the district judge meticulously and conscientiously followed the reasonably have done to assure us that he considered and weighed all of the § 3553 factors as they applied to this case. The district judge considered every piece of evidence in the extensive record before him, which is clearly sufficient to permit meaningful appellate review. The problem, if there is one, is that, beyond the offense itself, the government failed to present any evidence whatsoever to rebut or challenge any of the defendant's witnesses at sentencing. And, it was not the district judge's job, nor is it ours, to supply and rely on evidence that was not presented.

The bottom line is that the majority—based on its own finding of facts and credibility determinations—simply disagrees with the district judge's conclusion that seventeen years followed by a lifetime of supervised release is an appropriate sentence for Irey. Notably, the majority really does not offer any explanation for mandating that the district judge impose a sentence of thirty years of imprisonment in lieu of Irey's current substantial sentence.[1] Because the majority is not "reviewing"

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[1] The majority cites to numerous published and unpublished cases involving various different offenses against minors in which the defendants therein received sentences in excess of thirty years to suggest that Irey's sentence of seventeen and one-half years creates a "substantial disparity" that renders

it unreasonable. Majority Op. at 130-134. Looking at only the length of the various sentences in the cited cases, Irey's sentence arguably presents a disparity. However, Congress did not command sentencing courts to avoid mere "disparities" or even "substantial disparities." What it did require is that sentencing courts consider the need to avoid unwarranted disparities among similarly situated defendants. See 18 U.S.C. § 3553(a)(6). Whether one defendant's sentence creates an unwarranted disparity from other defendants necessarily requires a sentencing court to undertake a fact-intensive inquiry in the first place to determine whether the defendants are similarly situated. See United States v. Docampo, 573 F.3d 1091, 1101 (11th Cir. 2009) ("A well-founded claim of disparity, however, assumes that apples are being compared to apples.") (citation omitted). I believe a court cannot truly assert that one defendant's sentence creates an unwarranted disparity from another or several defendants' without the benefit of the entirety of the sentencing records of all the defendants. However, even if this extremely fact-intensive analysis can be based on the information contained in appellate opinions alone, consideration of any potential unwarranted sentencing disparity is not a task for the appellate court to complete in the first instance as the majority does in this case.

Moreover, several of the majority's cited cases contain facts that could just as legitimately support a finding that those defendants were not similarly situated to Irey and thus do not support the conclusion that the sentence imposed on Irey created an unwarranted disparity. For example, several of the cases concern defendants who, unlike Irey, proceeded to trial. We have previously held that defendants who plead guilty and assist the government are not similarly situated to those who proceed to trial. See e.g., Docampo, 573 F.3d at 1101 (holding that a defendant who proceeded to trial was not similarly situated to his co-conspirators who plead guilty and assisted the government and thus there was no unwarranted disparity between the

the district judge's judgment but rather is substituting its own and is assuming the role that the prosecutor failed to perform in presenting evidence that could arguably support a longer sentence, I dissent.[2]

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defendant's lengthy 270 month sentence and his co-conspirator's substantially shorter sentences).

[2] As I also noted in my dissent in Docampo:

Appellate courts have had no difficulty finding unreasonableness when asking [whether a sentence is enough punishment]. See, e.g.,[United States v.]Pugh, 515 F.3d [ ]1179 [(11th Cir. 2008)] (finding that probation for a possessor of some child pornography was insufficient). We should likewise be willing to find that, in a case that warrants it, "a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing," Kimbrough [v. United States], [552 U.S. 85, 91], 128 S. Ct. [558], 564 (quoting § 3553(a)). Our appellate sentencing review should not develop into a one-way rachet upwards. Just as the district court has an obligation not to assume the Guidelines are automatically reasonable, we too—as a circuit that does not apply a reasonableness presumption—are obligated to ask whether a within-Guidelines sentence is reasonable without any thumb on the scale. Thus, reiterating what we have previously noted, there are "many instances where the Guidelines range will not yield a reasonable sentence. . . . In some cases it may be appropriate to defer to the Guidelines; in others, not." United States v. Hunt, 459 F.3d 1180, 1184 (11th Cir. 2006).

Docampo, 573 F.3d at 1110-11.

FILED: March 30, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10997

D. C. Docket No. 06-00237-CR-ORL-31-DAB

UNITED STATES OF AMERICA, Plaintiff-Appellant,

versus

WILLIAM IREY, Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

(March 30, 2009)

Before EDMONDSON, Chief Judge, TJOFLAT, and HILL, Circuit Judges.

EDMONDSON, Chief Circuit Judge:

This appeal is about the discretion of a district court to impose a particular sentence. William Irey ("Defendant") --age 50 at sentencing --pleaded guilty to using minors to engage in sexually explicit conduct outside the United States for the purpose of producing visual depictions of such conduct and transporting those images to the United States. Believing that the sentence imposed on Defendant is too lenient, the government appeals Defendant's sentence of 210 months' imprisonment plus a life term of supervised release involving many different restrictions on his liberties. We affirm the sentence.

BACKGROUND

Defendant pleaded guilty to violating 18 U.S.C. § 2251(c). Defendant's guilty plea followed his arrest and indictment as the result of a nationwide investigation by the Bureau of Immigration and Customs Enforcement ("ICE"). ICE intercepted an online message Defendant posted in which he offered to trade pornographic pictures for a subscription to a pornographic website. ICE later searched Defendant's residence and discovered images of Defendant participating in sex acts with children between the ages of 4 and 16 years old. Further investigation revealed that Defendant had repeatedly traveled to Cambodia to engage in sex tourism, and that during these trips, he had videotaped and photographed himself engaging in sex acts with minors. The photographs depicted different graphic sex acts, and some included torture. The crime is an ugly one; the sentencing

judge described the conduct as "horrific."

The Presentence Investigation Report ("PSI") assigned Defendant an offense level of 43 with a criminal history category of I (no prior convictions); the guidelines imprisonment range is life. But because the maximum term provided by the statute is 360 months, the guidelines sentence is 360 months' imprisonment. U.S.S.G. § 5G1.1(a); 18 U.S.C. § 2251(e).

At sentencing, the district court adopted the PSI; and Defendant presented evidence. The court heard the testimony of Dr. Ted Shaw, who had earlier submitted a "Psychosexual Evaluation Report" on Defendant. Dr. Shaw testified that Defendant had a long-standing sexual obsession and was also suffering from either depression or an adjustment disorder with depression features. Dr. Shaw also testified that Defendant had accepted responsibility for his acts, was treatable, and could be successful in supervised release after treatment: Dr. Shaw stated that Defendant had a "medium low to medium" risk of recidivism. Members of Defendant's family also testified that Defendant was a wonderful husband, father, and person, that he had embraced treatment and had been acting as a peer mentor of other patients through Alcoholics and Narcotics Anonymous, and that they would remain supportive of him. The court noted Defendant's age.

The district court acknowledged the Sentencing Guidelines, observed that they are important but advisory, and recognized that, after determining the guidelines sentence, the court looks at the 18 U.S.C. § 3553(a) factors to determine an appropriate sentence. The district court also observed that the statutory minimum sentence for

Defendant's offense was 180 months and the statutory maximum and guidelines sentence was 360 months. The district court considered -on the record - -the nature of the offense, Defendant's victims, Defendant's personal characteristics and history, the interest in deterrence, and other factors in coming to its decision. The district court then sentenced Defendant to 210 months' imprisonment plus a life term of supervised release, including mandatory participation in a mental health program specializing in sex offender treatment.

DISCUSSION

Appellate judges are not authorized to substitute their personal views of what might be the best sentence for the sentence imposed by the district judge. See United States v. Melvin, 187 F.3d 1316, 1323 (11th Cir. 1999) (citing Williams v. United States, 503 U.S. 193, 204 (1992)). Nor are we, on review, looking to see if the district court's ultimate sentence matches the one precise and correct answer per some algebraic formula. Under United States v. Booker, 543 U.S. 220 (2005), we review sentences for reasonableness in the light of the factors listed in section 3553(a).* Id. at 261-62. We look to see if the district court abused its discretion. See Gall v.

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* These factors are to be considered: (1) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) the need for deterrence; (3) the need to protect the public; (4) the need to provide the most effective correctional treatment or medical care; (5) the nature and circumstances of the offense; (6) the history and characteristics of the defendant; (7) the Sentencing Guidelines range; and (8) the need to avoid unwanted sentencing disparities. 18 U.S.C. § 3553(a).

United States, 128 S. Ct. 586, 591 (2007). The party challenging "the sentence bears the burden of establishing that the sentence is unreasonable in the light of both [the] record and the factors in section 3553(a)." United States v. McBride, 511 F.3d 1293, 1297 (11th Cir. 2007) (quoting United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005)) (internal quotations omitted) (alteration in original). "Review for reasonableness is deferential." Id. (internal quotations omitted).

Sentencing post-Booker requires district courts to follow two steps: first, the district court must consult the Sentencing Guidelines and correctly calculate the guidelines sentence; and, second, the district court must consider the factors listed in section 3553(a). Talley, 431 F.3d at 786. The district court need not discuss all of the factors in section 3553(a); and when the district court has stated that it has considered the defendant's arguments and the factors in section 3553(a), that statement is sufficient under Booker. Id.

The government does not urge that the district court committed a procedural error in this case. The government concedes that the guidelines sentence was correctly calculated and that the sentence imposed was above the minimum sentence allowed by the statute. In effect, the government contends that Defendant's sentence was substantively unreasonable: too lenient.

Defendant's sentence of 210 months' imprisonment (and a life term of supervised release) is 30 months above the statutory minimum for imprisonment: but the government argues that the departure from the guidelines sentence was not justified. The government contends that the district

court relied on the view that pedophilia is an illness and contends that the district court failed to meet its obligation under section 3553(a) to consider the seriousness of the offense, the need to promote respect for the law, the need to provide just punishment for the offense, the need to afford adequate deterrence, and the need to protect the public from further crimes by the defendant.

"Although we accept that a sentence may be unreasonable even where the district court followed the proper sentencing procedure, an appellate court should not simply substitute its judgment for that of the sentencing court." McBride, 511 F.3d at 1297 (citing United States v. Melvin, 187 F.3d 1316, 1323 (11th Cir. 1999)). Even if we disagree with the weight the district court gave to some section 3553(a) factors, "we will only reverse a procedurally proper sentence if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the [section] 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." Id. at 1297-98 (quoting United States v. Williams, 456 F.3d 1353, 1363 (11th Cir. 2006)) (internal quotations omitted).

Our review of the sentencing transcript shows that the district judge took this sentencing seriously and proceeded thoughtfully: the sentence was reasoned. The district judge correctly calculated the guidelines sentence and was aware of the statutory maximum and minimum sentences for the offense. The district judge also stated that his consideration began with the guidelines and then incorporated the section 3553(a) factors. About the specific factors the government claims that the district court did not

adequately consider, we see that the district judge directly discussed them on the record.

We appreciate that some people may feel that no sentence would be too harsh for this crime. But that is not the law. And courts never should see the imprisonment in this country of a person for 17-1/2 years as light punishment: although even longer terms of imprisonment can be lawfully imposed in cases, this many years is a substantial portion of a human life --and no serious person should regard it as a trifle.

Furthermore, when the defendant is 50 at the time the sentence is imposed, the consequences must be seen as severe. Moreover, upon Defendant's release from imprisonment, he will not be free in the way that most Americans are free. He will be subject to rigorous conditions of supervised release by federal authorities. Given the terms of his sentence, never will Defendant be a truly free man again.

Sentencing is difficult work. The district judge faced Defendant and saw and heard what was presented at the sentencing hearing. The district judge, on the record, reasoned through the sentencing factors. The district judge then imposed on Defendant a sentence of imprisonment that is years beyond the minimum sentence that the pertinent criminal statute sets out as a minimum and, in addition, imposed a lifetime of supervised release.

If we were responsible for sentencing Defendant in the first instance, we might have imposed a different sentence: we clearly believe that sentences other than the one actually imposed might also be reasonable. But we must respect the district court as the sentencer, and we accept that the

sentence imposed by the district court is within the outside borders of reasonable sentences for this case. We cannot conclude that the sentencing judge abused his discretion. The government has not met its burden on appeal. The sentence must be affirmed.

AFFIRMED.

HILL, Circuit Judge, specially concurring:

I agree with what the district judge said at the sentencing hearing in this case, i.e., that sentencing is the most difficult job that a district judge has to perform. I agree with the panel majority in that we recognize that discretion is vested in the district judge and that is where it ought to be. I agree that our only review on appeal is for abuse of that discretion by the district judge.

I have studied this record and the sentencing transcript and the utterly gruesome details of the conduct involved here. I disagree with the conclusion by the district judge that there should have been a downward departure of any kind in this case.

I also disagree with the apparent weighty consideration that the sentencing judge gave to the notion that this defendant acted on account of some type of "sickness." The defendant acted deliberately, cunningly and with obvious delight. He ruined the lives of at least forty-three children (that we know of) and then published his triumphs on the internet for all the world to see, complete with scurrilous black marker writings tattooed on the nine-year-old

girls' skin.

Had I been given the heavy responsibility of sentencing in this case, my only regret would be that in the halls of Congress, the occupants of that legislative branch place an upward limit on this defendant's confinement. I strongly disagree with the district judge's sentencing in this heinous case, as he moves so far downward from the maximum upper sentencing limit that he nearly reaches the minimum limit.

I am persuaded that the sentencing in this case is not a proper one. However I am more dedicated to my strong belief that district judges "on the firing line" should have free rein to exercise sentencing discretion. Therefore, I am unwilling to say that the fact that I disagree with the sentence in this case is also sufficient grounds upon which to find abuse.

I reluctantly concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No.: 6:06-cr-237-Orl-31DAB

Orlando, Florida
January 29, 2008 1:00 p.m.

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM IREY,

Defendant.

Transcript of an excerpt of a sentencing
before the Honorable Gregory A. Presnell
United States District Judge

Appearances:

Counsel for Plaintiff: Cynthia Hawkins

Counsel for Defendant: Kirk Kirkconnell

Court Reporter: Diane C. Peede, RMR, CRR

United States Courthouse
401 West Central Blvd., #4600
Orlando, Florida 32801
(321) 537-2130

Proceedings recorded by mechanical stenography, transcript produced by computer.

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PROCEEDINGS

THE COURT: Call the case, Anita.

THE COURTROOM DEPUTY: This is in the matter of the United States of America versus William Irey, case number 6:06-criminal-237-Orlando-31DAB.

THE COURT: Okay. And appearance for the government?

MS. HAWKINS: Cynthia Hawkins for the United States, your Honor.

THE COURT: Okay. And for the defendant?

MR. KIRKCONNELL: Good afternoon, your Honor. Kirk Kirkconnell and William Ponall for the defense. And with me is Mr. Irey, the defendant.

THE COURT: Okay. Thank y'all. We're here today for the sentencing in this matter pursuant to notice. Mr. Irey pled guilty to Count One of the Indictment in this case on July 2nd of last year, and that count charged him with production of child pornography, in violation of 18, United States Code, Sections 2251(c).

I have – in connection with the sentencing, I have received and have reviewed the presentence report dated November 26, 2007. There's an addendum to that reflecting some objections, which we'll deal with.

I also have received and have reviewed the defendant's sentencing memorandum at document number 57 and the government's sentencing memorandum at document number 50.

I have Dr. Shaw's curriculum vitae and his report, Psycho-Sexual Evaluation report, dated December 3rd, which I have also reviewed. I think

that's the extent of the written documentation that I've looked at. And the report of Dr. Shaw was forwarded to me by Probation under cover dated of January 7, 2008.

Is there anything I've missed in terms of matters that I should have reviewed?

MR. KIRKCONNELL: Your Honor, there's a couple of additional letters, which I thought I handed them to Anita just a moment ago. Maybe I didn't. I've provided copies of these to the government. These are more letters of support. I thought I had already provided those. I've provided the government copies of those.

THE COURT: Well, I've reviewed several letters written on behalf of Mr. Irey.

MR. KIRKCONNELL: Your Honor, as you might recall, we asked for a portion of this hearing to be in camera; and I spoke with – and you granted the motion, unopposed. We spoke with Anita. And probably logistically the best way to do that is to do that first. It will require some live testimony.

THE COURT: All right. Well, tell me again what the purpose of the in camera is as opposed – I mean, I granted it, but I still need to know what's going on and why.

MR. KIRKCONNELL: Your Honor –

THE COURT: Why don't you go up to the podium, Mr. Kirkconnell, so we can hear you better.

MR. KIRKCONNELL: Your Honor, from the beginning of this case, Mr. Irey has been attempting to do substantial assistance. Because he has been in custody, he has been doing it with the assistance of his brother, Robert Irey, who is here presently.

This is an ongoing investigation. I have talked to Ms. Hawkins about it, and she has talked to the agent. They do not feel – and she has told me she is not willing, based on what we have, to file a regular 5(k)1 substantial assistance. But we ask you, Judge, to let us tell you a little bit about what has been going on so you can make a decision under all the facts and circumstances, character of the defendant and so forth, about some efforts he's made.

The reason this is in camera is because it involves the death of two United States' citizens in Iraq and the theft or loss of over $20 million. Mr. Irey and his brother have been attempting to assist the F.B.I. in bringing this person to justice and recovering this money.

It is – I see your eyes rolling there, Your Honor; but it's something which, if names are mentioned or places are mentioned, it could jeopardize the investigation.

THE COURT: I don't question that. I'm just wondering – absent the government's motion, which is entirely within their discretion, I'm just wondering whether this type of information is even something that's pertinent as a 3553(a) factor for me to consider.

MR. KIRKCONNELL: Well, Your Honor, again, the Court is much more familiar with the law than I, but my understanding is that that would allow us to – that that section of the statute allows us to present any factor that you could consider, even whether or not the government feels it's substantial assistance, character and circumstances of the defendant.

THE COURT: I can consider anything that's pertinent. That's my question. I have never before had – well, you know, I'll hear it out; but I'm just giving you some skepticism as to how much it is going to help me in terms of fashioning a sentence. I mean, I can assume he's trying to help the government, and I can assume he's attempting to do so in a matter of great importance; and Ms. Hawkins may even agree to that. So I don't know if I need to know the details, I guess, is what I'm saying. I'll listen to them.

Ms. Hawkins.

MS. HAWKINS: Actually, I think that the Court's probably cut to the chase from where we're coming from. I've spoken with the agent involved out of Washington. The case agent here today has spoken with that agent. We're talking about a meeting with an agent by the brother, the defendant's brother, in which he gave information that the agents said they could not use and are not pursuing. There is not an ongoing investigation into this matter. I mean, it was an effort of sorts on behalf of the defendant. I'll accept that representation, but I am told that there is nothing ongoing.

I think the court has the authority to listen to this, for what it's worth; but, again, I don't think it's pertinent; but I did agree that if it's certainly something if they want to bring up, they can

MR. KIRKCONNELL: Your Honor, we'll keep it relatively brief, but I would ask you to indulge us, if you would, and hear this.

THE COURT: All right. Well, who am I going to have to remove from the courtroom to do this?

MR. KIRKCONNELL: Well, I've told the probation officer. That's fine. The court personnel are fine.

I don't know who this gentleman is. Court personnel. Okay.

Just the court personnel. I just didn't want any other civilians in here.

MS. HAWKINS: The only other person is a federal agent.

MR. KIRKCONNELL: That's fine, Your Honor.

THE COURT: All right. Well, then unless somebody enters the courtroom during the process of this, we'll just go ahead and proceed then.

*****

(Per Judge Presnell's instructions, the in camera portion of this hearing is omitted from the transcript.)

MR. KIRKCONNELL: Your Honor, we can now go into the rest of the hearing, if you want to I'd like to call Dr. Shaw as our next witness.

THE COURT: Let the record show we're no longer in an in camera mode. We are open to the public.

Thank you sir. You can step down.

MR. KIRKCONNELL: The court has his report and his C.V., Dr. Shaw's.

THE COURT: Yeah. But before you do that, let's deal with these – any objections you've got to the P.S.R., Mr. Kirkconnell.

MR. KIRKCONNELL: I believe those objections have been addressed in the P.S.R., Your Honor. What's the date of the objections that you have?

THE COURT: September 17.

MR. KIRKCONNELL: Yeah. There have been two amended P.S.R.s since then. I think those have all been addressed.

THE COURT: Well, I don't happen to have copies of the amended ones. What you're telling me is there are no factual objections?

MR. KIRKCONNELL: Correct.

THE COURT: All right. The scoring in this matter is – I guess you could say it's simple. It maxes out at a 43/I, and there's a 15 year mandatory minimum and a maximum of 360 months. Is there any objections to that scoring?

MR. KIRKCONNELL: No, Your Honor.

THE COURT: All right. The Court then adopts the factual statements contained in the presentence report as the findings of the Court inasmuch as there's no objection thereto, and determines that the advisory guideline score is 43/I, which would call for a term of imprisonment of 360 months; supervised release of between five years and life; a fine of 25,000 and $250,000; and a $100 special assessment. So that's the score we're dealing with.

So we're now at the point where you want to present some mitigating evidence?

MR. KIRKCONNELL: Yes, Your Honor.

THE COURT: All right. And you want to call Dr. Shaw?

MR. KIRKCONNELL: Yes, Your Honor.

THE COURT: All right.

THE COURTROOM DEPUTY: Please step forward and be sworn. Please raise your right hand.

TED SHAW

Having been first duly sworn, was examined and testified as follows:

THE COURTROOM DEPUTY: Please state your name for the record.

THE WITNESS: Ted Shaw, S-h-a-w.

THE COURTROOM DEPUTY: Have a seat, sir.

MR. KIRKCONNELL: Your Honor, if we could, we – I think that the government and the defense are prepared to stipulate to Dr. Shaw's expertise. I believe the Court is actually familiar with Dr. Shaw from other cases, too.

THE COURT: Yes, I am. If there's no objection, I'll certainly recognize him as an expert in the field.

THE WITNESS: Thank you, Your Honor.

MR. KIRKCONNELL: Your Honor, the Court is in possession of Dr. Shaw's C.V. and also his Psychosexual Evaluation report; and rather than have him go through the entire report – I know the Court has read it – I just would like to have him, if he could summarize it. I'm going to ask him a couple of questions and see if the government or the state has any questions.

DIRECT EXAMINATION

BY MR. KIRKCONNELL:

Q. Would you tell Judge Presnell, if you would, after your time and testing of Mr. William Irey, what your findings were and what your recommendations are, and if you could also comment on the treatment he's been getting and Dr. Berlin's report, which you utilized?

A. Certainly. Well, as I summarized in my report, Mr. Irey has a – a long-standing problem with sexual obsession. He has a fairly recently identified problem of either depression or an adjustment disorder with depressed features. Dr.

Danziger made note of that. But oftentimes people engage in compulsive sexual behavior as a self-treatment for depression. It may be that Mr. Irey suffered much longer from that, and has been treated in the Lake County facility for depression in addition to being treated with an addictions model.

Now, in lay terms, Mr. Irey suffers from something like sexual addiction; and like many addictions, it starts out limited, somewhat limited, and then it gets – spreads. It gets worse.

Using the DSM-IV TR obsessive-compulsive type disorder, not the full-blown disorder, but with the sexual behavior being the most prominent feature would be more the way it would be described there.

This started out as the use of prostitution and –

Q. Doctor, all that is contained in the report. What I want you to do is summarize – the Court has read the report.

MR. KIRKCONNELL: Right, Your Honor?

THE COURT: Yes, several times.

THE WITNESS: Sorry.

BY MR. KIRKCONNELL:

Q. Summarize the report. The Court is aware of that. So if you could talk perhaps about his amenable to treatment, your recommendations.

A. Okay. I don't usually talk about it without the introduction. So I apologize.

THE COURT: No problem.

A. Well, first of all, I did clearly find – I found Mr. Irey amenable for treatment; and I'm not surprised, in reviewing Mr. Spears' notes, after eleven therapy sessions that in fact he has made observable progress in the areas that have been

addressed in treatment. Mr. Spears, who's a clinical partner of mine and has worked with me for many years, focused on relapse prevention and cognitive restructuring. These are two standard and important components of sexual treatment that would translate into any other program that he would attend afterwards to give him a jump start. And Mr. Spears found, as I suspected he would, that he was open to confrontation and to looking at his behaviors and his thinking and urges critically and has already become, I think, more sensitive to the global impact of his behavior as well as the specific impacts on victims that his behavior caused.

I didn't find any evidence or sufficient evidence to make a diagnosis of any personality disorder, neither did the other doctors, Dr. Berlin or the other doctor who evaluated him, and that's important because personality disorders interfere with treatment progress and they often later interfere with compliance and supervision when a person returns to the community.

THE COURT: Is that the Axis II diagnosis?

THE WITNESS: Yes, Your Honor.

A. So I did leave it deferred because it's possible that a later intensive treatment might find a compulsive disorder. But perhaps not surprisingly, compulsive disorders are the one disorder that improves compliance with supervision. People – a lot of people who are compulsively into something bad, once they've been rehabilitated, then they become as dedicated to doing things right. That's often true with pedophiles, who actually tend to do very well in the community under supervision.

He does accept responsibility for his behavior. As I said, he was open to facilitation and confrontation.

The other really important aspect of Mr. Irey's background is that he has overall in his life been a social individual, a person with much responsibility, both with family and in business, and has comported himself, from all reports, honorably and responsibly with credit and maintaining his family. He has this sort of encapsulated problem that grew and became worse.

In general, when individuals have that kind of a problem, it makes them more treatable. The other parts of them are healthy, and they're able to get those resources and marshal them to work on their problem. For me, I think the one other – so that's amenability.

I also summarized my opinions in terms of his recidivism risk. May I speak about that?

Q. (Nods head affirmatively.)

A. Now, I used empirically validated actuarials. They do not apply to people who have committed only the crime of viewing or sharing child porn; but because there were acts of Mr. Irey's that were part of the porn and part of his problem I thought it was appropriate to consider them. He's essentially in the medium low to medium or moderate risk categories, which is – which is below a threshold of likely. In my opinion, it would make him unlikely to be seriously considered for civil commitment under – in terms of my understanding the the Adam Walsh Act and how it's playing out in terms of the concept of likely to re-offend.

He also has – he's very low in psychopathy, which is the essential elements of criminality.

Again, he has this encapsulated area where he was cheating, where he was lying, where he was violating laws; but outside of that, he was – appears to be – to have been a law-abiding citizen.

Now, he does have the opportunity while incarcerated in the federal prison system to participate in residential treatment. I have every reason to believe he will volunteer, as he has for just about every treatment that has come along; and, of course, he will be provided with informed probation supervision. As I'm sure you've noted, I have a number of contracts with U.S. Probation to provide treatment for them, and their level of professionalism is very high and clients supervised by them are getting very, very clear sex offender specific supervision.

Dr. Berlin suggested that Mr. Irey's risk could be further reduced by the use of antiantigens; but I hesitate to recommend to the Court that that be put into any form of court order because antiantigens come with a number of side effects, including depression, and they're not always useful. they are sometimes useful; but Mr. Irey is going to be older, obviously, when he is released, when and if he's released, and he's going to have experienced a reduction naturally in testosterone and a reduction in sex drive. So he's going to – the use of antiantigens might or might not be necessary.

I have recommended and continue to recommend that it be considered, that it be an option, and perhaps even ordered to be considered at the time of release because it can be helpful; but the state of Florida has some laws that require it under certain conditions, and no clinicians have agreed with that way of using antiantigens.

THE COURT: I can assure you I'm not going to make that decision.

THE WITNESS: Thank you, Your Honor.

A. So overall, I find him to be, as I said, a moderate risk, a low-moderate risk, low in psychopathy. He does have – has deviant interests. Those interests, he himself has been working on reducing and are likely somewhat reduced already. They are fueled by obsessive thinking and masturbating and by the sex acts themselves.

So I made just three very simple recommendations at the end of my report, that he be – I hope that he's provided with an opportunity to participate in treatment within the U. S. Bureau of Prisons; and that I don't think he will be a candidate for Adam Walsh, a reasonable candidate; and that he should be provided with extended probation and be required to participate in treatment when he's released.

Q. Than you Dr. Shaw.

MR. KIRKCONNELL: Does the court or counsel have questions?

THE COURT: Let me – before you begin, Ms. Hawkins, let me just – the term "pedophilia," that is a recognized condition or disorder, that is, it's recognized in the medical community as such?

THE WITNESS: Yes, Your Honor.

THE COURT: I mean, is it an illness? I mean, how would you describe that as a mental health professional?

THE WITNESS: First of all, I would like to say if you have Dr. Berlin's report, he was part of the subcommittee that wrote the definitions of pedophilia in the DSM-IV TR, and I thought he did an eloquent job at describing it.

I'll take my shot at it. It is a disorder of sexual interest and behavior, and you can have the diagnosis with only the interest. So you could be fascinated, sexually attracted to children and never act on it, and – but if it troubled you or caused any problems for you, you would still be diagnosable with that disorder, and that is being attracted to or engaging in behaviors, sexual behaviors, with prepubescent children.

So it is clearly a well –recognized disorder, and I thought that Dr. Berlin did a good job of saying that it's not a disorder that someone chooses. It's something that is within you and you have some tendency towards it.

And frankly and quite sadly, I think the availability of child images, particularly on the Internet, has fueled an epidemic of pedophilia that was kind of probably in the background, people might not have even known that they suffered from it, and then come across these images. But nonetheless, it is a treatable disorder. So it's a disorder that has different origins.

And Mr. Irey talks about how the disorder manifested itself for him in his being provided with a very young – or very young prostitutes without asking for them initially; but then he found himself first repelled but then attracted to them, and that's that sort of natural biological disorder part of it that's different from the moral and ethical issues.

So for another person, if they had been in the same situation, they may have been repulsed and stayed repulsed by it and, you know, not – just said, "Don't ever do that again and I'm not interested;" but that led him into a spiral of interest in children

sexually. So that's the way that it's manifested itself here.

THE COURT: I guess what I'm trying to get at is that – I mean, I unfortunately – unfortunately, we see more and more of these cases here; and they're very troubling, for obvious reasons. And I've heard various comments from Probation that it's not treatable. I've heard comments from people, when I suggest that it's both an illness and can be carried forward into criminal conduct, people accuse me of not knowing what I'm talking about when I say it's an illness, and maybe I don't. That's why I'm asking you .

And I guess the question is, form a standpoint of criminology, is a person who acts out as a result of this condition acting totally of rational free will or is that person acting out as a result of something that is in essence an illness that he at that point has no control over? Do you understand what I'm saying?

THE WITNESS: I do, Your Honor. I think that the fact that pedophilia is not an underlying element for competency or sanity – it is an Axis I, treatable disorder. Those of us who have been in the field – I've been in the sex offender field actually since 1976; and there were pioneers in the field before me, long before me. We have been treating pedophilia for decades.

It is – I think that the problem that a lot of lay people have is in distinguishing between people who are disordered, seriously disordered, and curability versus treatability. Pedophilia is very treatable, and there are many pedophiles in the community who are doing just fine and managing their behavior.

As I'm sure you know, probationers, U.S. probationers, are now subjected to an annual

polygraph about whether they are following the rules of their probationer or whether they are re-offending. Pedophiles are capable of not re-offending, even if they have an urge, in the same way that compulsive dessert eaters can choose to not eat dessert.

They have different levels of struggling, and there are aids to that: Good supervision, good treatment, replacing those needs with healthy needs, a lot of treatment is helping people understand the origin of their disorder and then teaching them to, first of all, be aware of the danger signs, the risks to relapsing, but at the same time replacing the way that they were meeting the needs met with the disordered behavior, meet them in healthy ways; and that's something people can be taught. People like Mr. Irey, who's bright, who has been successful in business, he can certainly learn the techniques that we teach to prevent – be responsible himself for preventing a reoffense.

It's – I think because we like to say, "You can't be cured" – in other word, the best long-term treatment is to be alert to the problem and to – that's not a cure. Cures, you can forget about it. Just go be around kids again and don't worry about it. That, we can't do.

But there are, you know, thousands of pedophiles and child molesters, different, out there, in my belief, who aren't re-offending, who are in recovery and doing just fine. the new treatments that we use are, I think, very effective.

THE COURT: Okay, Thank you.

Ms. Hawkins?

CROSS-EXAMINATION

BY MS. HAWKINS:

Q. I'm going to follow up on a question the Judge asked in terms of the definition of a pedophile. Pedophilia is defined, is it not, by the age of the child that the defendant would be attracted to?
A. Well, in there, it does say "approximate age."
Q. The degree of –
A. Thirteen.
Q. Or prepubescent?
A. yes, but because puberty has been – kids are getting – reaching puberty younger and younger, that's – that's a little complicated; but, yes, certainly partly by the age.
Q. In this case, the defendant was diagnosed as a pedophile with a sexually interest in children younger than 13, prepubescent children?
A. That's correct.
Q. Now, in terms of the risk assessment, the Static 99 and the MNSOST-R, in those tests, were just pedophiles used as a control group?
A. No. there were individuals in the study who were rapists as well.
Q. Okay.
A. Child molesters, some of them were pedophiles and rapists.
Q. Exactly. So there were some adult sex offenders – victims that were adults, some that had victims that were teenagers, and then some that had victims that were prepubescent?
A. yes.
Q. Now, you did say that you didn't make a mental health diagnosis, a personality disorder diagnosis, correct?
A. Right. I did make a diagnosis of depressive disorder and OS.

Q. And you would agree with me that being an alcoholic or being depressed does not cause one to be a pedophile, correct?
A. Absolutely correct.
Q. And isn't it true that people that are characterized as sex addicts or characterize themselves as sex addicts often are not pedophiles; is that correct?
A. Yes, ma'am.
Q. Did you look at any of the photographs of the defendant's victims?
A. Not in this case, no.
Q. Did you know how many victims he had?
A. In terms of the pictures, ma'am?
Q. No. In terms of the individual young children.
A. I'm not sure whether I was given a – any total count.
Q. Would it make a difference to you to know that the defendant committed sexual molestation of over 50 children?
A. It actually wouldn't surprise me, and I knew that the problem had been going on for some time, and he did admit that he had become more and more obsessed and was returning to Asia more and more often for the purpose of engaging in these behaviors.
Q. Did the defendant admit to you that he used different items to penetrate children?
A. He didn't describe those to me, but I did read them in the file; and I – as I'm sure you know, it's not easier to talk about it. I wasn't there to do therapy with him but really just to make an assessment. So that would come out as – in fact, he is talking much more about what he's done in therapy now than when I first interviewed him.

Q. That has more to do with therapy as opposed to your assessment?

A. Yeah. I mean I assume people are going to minimize and leave some of the worst things out. As part of survival as a human being, we don't – it's hard to face the worst things that we've done. So we let it out little by little.

Q. Did you discuss with the defendant that he had distributed images of himself molesting prepubescent children over the Internet so that they are freely available to any number of people throughout the world?

A. Yes, ma'am, we did discuss that.

MS. HAWKINS: I have no other questions.

MR. KIRKCONNELL: I have no further questions, Your Honor, unless the Court has some.

THE COURT: No, I don't.

Doctor, I appreciate you being here.

THE WITNESS: Thank you, Your Honor.

MR. KIRKCONNELL: May Dr. Shaw be excused?

THE COURT: He may.

MR. KIRKCONNELL: Thank you. Your Honor, at this point I would ask the Court's permission – I've provided the clerk with a couple of very short videos by family members. I would ask the Court to allow me to play those at this point.

THE COURT: Okay.

(Video played in open court as follow.)

A VOICE: "It's called the clubhouse. Bang, bang, bang" –

MR. KIRKCONNELL: Stop it a second, Anita.

Your Honor, first of all, let me identify this young man. this is Mr. Irey's youngest son who is speaking in this video.

THE COURT: Okay

MR KIRKCONNELL: Okay, Anita.

(Video played in open court as follows.)

A VOICE: "At my house about three years ago" –

THE COURTROOM DEPUTY: let me rewind it.

(Video played in open court as follows.)

A VOICE: "this is a story that I wrote last year for a project. It's called The Clubhouse. Bang, bang, bang. At my house about three years ago, my dad and I built a clubhouse. First, my dad and I had to go get a lot of supplies at Home Depot. We got hundreds of planks of wood and lots of nails, an electric saw and a hammer and lots of other stuff.

"When we got home, my dad drew out what it would look like. It looked awesome.

"Next, my dad and I started to saw the lengths of wood into a perfect size. Then my dad and I started to build a fantastic clubhouse. My dad showed me where to hammer, and I nailed the nails into the wood. It took us about three to four weeks to sand – to build the clubhouse and an extra one week to sand it down and put the swings on.

"Then when my dad and I were done, it looked superb. Not a board was crooked or out of place, not a nail was loose. The swings were perfect and the inside was big and nice. The clubhouse was the nicest clubhouse I've ever seen. I owe it all to my dad. 'Thanks, dad,' I said.

"The best part of building the clubhouse was building it with my dad.

"We also had fun time in the boy Scouts, Indian Guides, and throwing the football around the yard. I couldn't believe it when he built me a dirt bike track. It is so much fun. I miss doing all that stuff with him. I love my dad. I need my dad.

"A MALE VOICE: That was a real good job."

(On the video appears a motocross rider riding his dirt bike.)

MR. KIRKCONNELL: Anita, you can skip that.

THE COURTROOM DEPUTY: Is it right after this?

MR. KIRKCONNELL: Your Honor, this is Mr. Irey's daughter. She's 16.

(Video playing in open court as follows.)

"BARBARA IREY: There are millions of words that I could use to describe my father, but by far the best one would be 'loving.' I can't thank my father enough for everything he has done and everything he has shown me in life. My father has taught me how to be strong, respectful, honorable, loyal, and the list can go on and on. My father has also taught me that nothing is impossible and that nothing important comes without hard work.

"I have learned that it's okay to mess up, but you just have to pick up – pick yourself up and you'll end up being stronger.

"And I've made a slide show showing the father that he can be."

MR. KIRKCONNELL: That's all for this video. the next one would be Defendant's Exhibit Number 2, Your Honor.

Anita, can you –

THE COURTROOM DEPUTY: Yeah, it's rewinding it.

(Video played in open court as follows.)

"CANDY IREY: My name is Candy Irey. I'm Bill's wife. We've been married for 25 and a half years. I wanted to do this tape in lieu of being up on the stand because I didn't feel I'd be able to get out what I needed to get out the day of the trial.

"Bill is one of the most amazing people I've ever known. He's a loving and wonderful husband and father. When the children would ask Bill to help them or play with them, he would always stop what he was doing and go to them.

"Whenever they would make mistakes, he would talk it over with them and show them what they did wrong and how to make sure it wouldn't happen again. He would get the point across in a way that would not belittle them.

"They always felt comfortable coming to him for advice. Bill made sure the kids knew that they were important to him, and also whatever they were involved in was also important to them, too.

"When the kids were involved in clubs or sports, Bill would always volunteer to help out. Bill was the cub master and leader for the Boy Scouts when Glenn was in the Boy Scouts. He would always have campouts with the troops. Bill would always have the parents come with the kids so it made it a family campout and not just the Scouts.

"Bill was also mindful of other people's feeling. One time sticks out in mind when he was leader for our group. One of the families could not afford a uniform for their son. Bill told them not to worry, that the troop had extras. The real truth was that Bill paid for the uniform himself but did not tell the family so that they kept their dignity. This is the typical side of Bill. He would always help out but

never wanted the recognition. Just seeing the result was enough for him. He always taught our children that it didn't matter who got the credit. What matters was that whatever needed to be done was done.

"Another time one of our workers was bleeding in his brain. He had to be hospitalized and had tubes drilled in his head to drain the blood. The eventually had to drill into both sides of his skull. When he was released, he was no longer able to perform his job because he was never able to concentrate like he used to. Bill created a new position for him so he could remain on the payroll and also still have his medical insurance. He kept him employed for one and half years after his surgery, and then we had to close due to Bill's being arrested. Again, Bill never asked for anything in return.

"I could go on and on about the different times Bill could help people. We just don't have enough time.

"Bill was always looking for ways to give back to the community. He was involved in the Rotary Club, he was a 32nd degree mason, and he served on the boards of the United Way, Dr. Phillips YMCA, and the Mount Dora Icehouse Theater. He also donated his time and money doing various projects for Give Kids the World and also the Shriners.

"Bill even helped out the local fire department. One of the volunteers had called him to help him find a boy that was missing and they thought might have drowned in the river. Bill was a scuba diver at the time. He helped them search the river, and Bill was the one who found him. He brought him to shore, but he was already dead. This

had such an affect on Bill that he wasn't able to scuba dive again.

"It was probably about 15 years later when our son Jim was going for his open water dive and Jim was able to talk his dad into coming with him.

"During Hurricane Andrew in Miami, Bill had donated our camper to the church so they could use it for the families who had lost their homes. This camper was passed on from family to family as their houses were being fixed.

"Bill not only helped people, but he also helped animals, too. One time our neighbor's two dogs were attacking another animal. Bill went out to save the animal, and he found it was another dog. He rescued it from the two dogs and brought it into the house. After putting up fliers and posting ads in the paper, no one claimed the dog. The dog, which is now known as Fox, has been part of our family for four years now.

"Bill has been in LifeStream Medical Hospital for a year now. During his stay, he found ways to help others. There is one patient in particular that sticks out. His name is Eric. He was admitted into the detox facility. Bill talked to him about the problems – about his problems and even talked to him into going into the Baptist ministry program. Eric later came back as a visitor to see Bill and he told him he was now getting married and moved to Tennessee. Even in the worst of times, Bill sees to helping others in need.

"I'm very blessed to have been part of Bill's life for so many years. He's taught me so many things.

"When we were married and gave our vows, part of those was for better or worse, in sickness and

in health. These vows still hold true in my heart, and I will be there for Bill until he is well enough again and he can come back home to his family."

MR. KIRKCONNELL: I'm not going to play the video. I think you kind of get an idea of the family support, Your Honor.

THE COURT: I do.

MR. KIRKCONNELL: The other video consists of family photographs. It's available, if the Court would like to see it; but I think you get the flavor of the family here.

THE COURT: I understand that Mr. Irey has been a good family man and has family support.

MR. KIRKCONNELL: Okay. the next witness, Your Honor, we'd ask the Court to consider is Jim Irey.

THE COURT: Okay.

THE COURTROOM DEPUTY: Please step forward to be sworn. if you will, stop and raise your right hand.

JIM IREY,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

THE COURTROOM DEPUTY: Please state your name for the record.

THE WITNESS: James Irey

DIRECT EXAMINGATION

BY MR. KIRKCONNELL:

Q. Good afternoon. Would you tell the Judge and counsel your relationship to the defendant, Bill Irey.

A. Bill's my father and I'm his oldest son.

Q. Do you have some thoughts you want to share with Judge Presnell regarding your dad?

A. Yeah. I've prepared a list of thoughts that I had, just stuff throughout the – my years; but I also prepared a statement, too, a list of thoughts, just twelve out of the many, that's something that I can hand to you; but this statement is something that I was wanted to read, if that would be all right.

Q. Go ahead.

A. All right. I want to tell you about a man I call "My hero."

Q. Can you get closer to the microphone, please. We can't can hear you.

A. I want to tell about a man I call "My hero." Ever since I was a little kid, I've been absorbing everyday and every challenge like a sponge. I have been taught the most valuable of life's lessons, and can say that I've grown to be a man that everyone can respect and be proud of.

Watching my hero and learning form my hero has given me the courage, the strength and the faith to accomplish so much in my short life. Without his guidance and persistence, I would not have followed in his footsteps and become a respected community leader of Dr. Phillips, through the Rotary Club of Bay Hill. I joined Rotary when I was 19 years old; and after three years of earning (sic) our community's biggest event and fund raiser, which my hero helped in every step of the way, I was placed on the board of directors where I was able to do more good. I am still involved in it and now have become a Paul Harris Fellow, just like he is.

My younger years is when I learned a little hard work can go a long way for someone in need of a helping hand. After helping my hero volunteer at Give Kids the World by laying pavers and watching him build, I decided to stick around and help every

other week for a number of years. I have now brought that feeling back into my life by chairing a monthly event for Give Kids the World through our Rotary Club family.

Whether it be by his involvement in my Boy Scouts, by coaching me in sports or just being there for others, he has taught me so much about life and love. Even with all his accomplishments in life, his job is still not done for he has two more sons and a daughter that need to be taught these valuable life lessons. What better person than the one who taught me, my hero, my star, our father.

Q. Thank you.

Mr. KIRKCONNELL: Questions?

MS. HAWKINS: No.

MR. KIRKCONNELL: Thank you.

THE COURT: Thank you, sir.

MR. KIRKCONNELL: Your Honor, we'd call John Sebring at this time.

THE COURTROOM DEPUTY: Please raise your right hand, sir.

JOHN SEBRING,

having been first duly sworn, was examined and testified as follows:

THE WITNESS: Some water, Your Honor.

THE COURT: There should be some in there.

THE COURTROOM DEPUTY: There is.

THE COURT: If not, we'll give you some.

THE COURTROOM DEPUTY: There's some in there. Just twist the top a little bit.

DIRECT EXAMINATION

BY MR. KIRKCONNELL:

Q. Mr. Sebring, would you explain to the Judge and counsel who you are and how you know William Irey.

A. My name is John Sebring. I served with Billy's father in Korea; and when I returned home – I'm from New York – we visited the Ireys many times and basically saw Billy grow up.

Q. Can you speak a little closer to the microphone.

A. Better?

Q. Yes, sir. Thank you.

A. I basically saw Billy grow up on and off; and when Billy moved to Florida, I came down with my family and I called Billy up and asked him, "What do I do about Disney tickets?" And he told me to meet him at a location; and when I met him, he had purchased the tickets for my family.

When I visited them in Florida many times, Billy and Candy, and I saw him interact with his children. I saw him as a loving father who cares deeply for his family.

On a personal note, when my wife had a problem – my wife is Chinese – when she had a problem – her family had a problem in China, Billy used his contacts in China to help her family out.

I – when I moved to Florida in '03, Billy called me and asked me if I was interested in a supervisory position at Disney World, which I declined.

But I would like to say that I don't see any advantage in putting this man in prison. I did 32 years in law enforcement in New York City. I saw a lot of bad people, and Billy Irey is not one of these people. Thank you.

MR. KIRKCONNELL: Thank you, sir.

Your Honor, we'd next like to call Ben Sandrock.

Ben, stop and let the clerk swear you in.

BENJAMIN SANDROCK,

having been first duly sworn, was examined and testified as follows:

THE COURTROOM DEPUTY: Please state and spell your last name for the court reporter.

THE WITNESS: Benjamin Sandrock, B-e-n-j-a-m-i-n S-a-n-d-r-o-c-k.

DIRECT EXAMINATION

BY MR. KIRKCONNELL:

Q. Ben, would you please tell the Judge and counsel what your relationship is to the defendant, William Irey?

A. He's my Uncle Bill.

Q. And how? Is he your dad's brother, your mom's brother?

A. My mom's brother.

Q. Okay. did you have some thoughts you wanted to share with Judge Presnell before he sentences your uncle?

A. Yes.

Q. First of all, how old are you and what do you?

A. I'm 23 and I'm a grad student at Tiffany University in Ohio.

Q. What are you studying?

A. Sports management.

MR. KIRKCONNELL: If I may, Your Honor.

BY MR. KIRKCONNELL:

Q. Go ahead.

A. To be honest, when I was asked about speaking on behalf of my uncle, one thought and one

thought only popped into my head: It would be my honor.

In my short 23 years that God has given me, I've never met somebody like my Uncle Bill. Not only is he the most spirited and the most giving person, but he overall is just one of a kind. I like to think that when God created Uncle Bill, He took a step back and He said, "I'm really going to like this one."

In our family, we have an action we refer to as "the Uncle Bill." "The Uncle Bill" means pulling over and helping someone that has pulled off to the side of the road. I guess as a whole, we really haven't done a good job of labeling "the Uncle Bill," because that would refer to helping anybody in need at any moment. Actually, that would refer to having an impact and helping every person that you come in contact with.

When I was in middle school, my dad was in and out of work because of cancer and health-related issues. My family was not able to go on vacations, but my Uncle Bill was always sure to bring me on his. And at any time I wanted to come and visit, it was only a phone call away.

Things did not change as I went to college. I was unable to buy a computer before my freshman year, but my Uncle Bill once again came to the rescue and got me one.

I was a kicker for the football teams through high school and college, and every summer I would practice kicking footballs on our homemade uprights at our place at the river. Nobody ever really wanted to job of fetching the footballs and bringing them back to me; but, sure enough, every time my Uncle

Bill came into town, he would stay out there for hours upon hours.

Overall, Uncle Bill not only gave his effort, his work and his love and his effort, his work and his love and his care, but he gave something that most people in this world believed they have run out of: Time. Uncle Bill always made sure that he gave you his time. I can't begin to describe to you how many hours I spent talking to him about my dreams and aspirations for the future. Although at that time my dreams probably would have brought laughter from others, my uncle not only listened, but he gave advice and motivation for going after my dreams.

Uncle Bill really had a way of touching people's lives in a way that I've never seen before. People around me must really enjoy my company after I've just been around Uncle Bill and his family. I've found that I look to help people instead of people reaching out to me for help. You see, it's a mind set that everyone should look for. Uncle Bill taught me that helping someone is a gift that can be given in an instant and a gift that never runs out.

The easy way to see your character is to look at the people you are surrounded by. Uncle Bill surrounds himself with an unbelievable wife. His four children are the best people that I've ever met. Their family is loving and giving, and this is a true reflection of my Uncle Bill's character. He brings out the best in every single person that he meets.

You can't look at my uncle – you can't look at my Uncle Bill and say, "That man's glass is half empty or half full," because my Uncle Bill is pouring his into the thirsty person's glass next to him.

MR. KIRKCONNELL: Questions from the court or counsel?

MS. HAWKINS: No.

MR. KIRKCONNELL: Your Honor, my next-to the-last witness would be Glenn Irey.

THE COURTROOM DEPUTY: Please stop and raise your right hand,

GLENN IREY,

having been first duly sworn, was examined and testified as follows:

THE COURTROOM DEPUTY: you can have a seat.

DIRECT EXAMINATION

BY MR. KIRKCONNELL:

Q. Mr. Irey, would you tell the Court and counsel what your relationship is to the defendant, William Irey, and what – your age and what you're currently doing now.

A. My name is Glenn Irey. I'm William Irey's second son. I'm currently 20 years old. I'm a student at the University of Florida, studying economics.

Q. Do you have some thoughts that you wanted to share with Judge Presnell before he sentences your dad?

A. Yes, I would. When I was trying to think of what to say here today, I realized I would be speaking in front of a lot of people I don't know as well as the people that mean the most to me; but this is really just about one person.

Dad, there are a lot of things that I've always wanted to tell you but never got around to or maybe just not saying it enough. First of all, dad, I would like to say thanks for almost 21 years stock full of some of the best moments of my life.

I've been listening to what you say, I've been watching what you do, and it's taught me more than

you could ever imagine and more than I could ever express on a pen some silly sheets of paper.

Do you remember the day that you decided I was going to learn how to ride a bike? You sat me down on Jim's bike and you grabbed the back of the seat and you said, "Are you ready?"

I said, "Dad, I have no idea what to do."

And you said, "Sure, you do. Just keep the handlebars straight and pedal, and I'll be right here with you just in case anything happens."

So off we went. I got a couple of feet before I freaked out and put my foot down. I looked back and I saw you back at the starting point clapping with Jim. I was furious. I said, "Dad, you know, what if I fell, " to which you replied, "Then I would have picked you back up and tried again."

I learned that day that sometimes you do fall. No biggy. You're never down forever. That also taught me to believe in myself.

At that same time we lived down the street from a classmate of mine named Jonathan Scott Slater. He would call a couple of times a week to play, and couple of times a week I could come up with some excuse as to why I couldn't. You see, he just kind of seemed a little weird.

One day my dad sat me down and said, "Son, why don't you give this boy a chance? An hour out of day won't kill you, but it might make the world – it might mean the world to him. If you were in his shoes, how would you want to be treated?

You made me go that day, and yet he was a little weird, but he soon became one of my good friends and eventually joined the Boy Scouts with me.

You've taught me to stick up for the little guy because a lot of times nobody else will and, heck, it's always nice have someone in your corner. You've taught me not to be ashamed to cry, that caring about something that much is really something to be proud of.

I wanted to thank you for making me feel like I was always the most important part of your life. I always enjoyed coming home from college and talking with you on the pool swing about everything from politics to history to whatever was on my mind. those talks captivated me for hours and stimulated my mind more than anything that ever happened in class.

I think it's incredible that you gave your mom flowers on your birthday. A day that most people spend thinking only of themselves, you take the time to thank the woman that made it happen.

I want to thank you for choosing the woman that made me happen. Mom is amazing, and I hope that one day I can find love like you and mom share.

You're so full of love and joy. You're giddiness toward each other and every day id contagious. Just being around you, dad, gives me such a brighter outlook on life; and I'm jealous that you're more youthful than I am, despite being over twice my age.

I apologize for the disorganization in my testimony. It's a work in progress.

I got involved in Mount Dora's Community Theater when I was ten years old, and for six years you drove me an hour there and an hour back at least four days a week. You even became a member of the board and donated a much-needed concrete patio.

You allowed me to move to California for six months when I got the opportunity to perform for Ray Bradbury in Burbank. You went above and beyond what you had to. You also taught me about commitment when I was fed up and ready to quit halfway through a show's run.

You always gave me a summer job working for the company. I worked with Danny when we got the job at All Stars Resort. And one day he really got upset at Disney's on –site management. He said he had turned down a higher-paying job that didn't deal with Disney because he enjoyed working for you. He said you always treated everyone with respect, regardless of their job title; and to him, that meant more than money.

My senior year of high school, you gave the school a $40,000 kiosk so that my classmate and I could start up a bookstore on campus. The bookstore didn't quite work out, but it meant the world to me that you believed in me and offered your support.

I'm amazed at how you deal with adversity. This past year has been tough. I can't imagine what it's been like for you. But much the same as you always have done, you've looked for the positives and found the light in the darkness. You've made us various figurines and dream catchers to remind us of you. You always have a cheery disposition, even when I'm ready to break down and cry.

You're 1500 pages into a brilliant series of novels that you've written yourself, and you aren't bitter toward anybody. In fact, you've almost become an honorary member of the LifeStream staff by heading AA and NA meetings, participating in church services, and monitoring – or mentoring patients. You're the first person that the nurses call

when a patient gets out of hand, and it was only two days ago that you saved a woman's life after she had just had a stroke and the field service technicians only wanted to just – they were just in a rush to get going.

One night right before Christmas I came to visit and was surprised to see that I wasn't the only one that night. A man who had been in LifeStream with you had come back to visit. He told me "There's just something about your dad. I don't know what it was, but there is some sort of connection there. He helped me out a lot." I know what he means. You somehow seem to know just what to say just when I need to hear it the most.

Through the years many people have told me about what an extraordinary person my dad is, but he would be the first to tell you he'd just a regular guy.

But, you see, dad, what makes you seem so extraordinary to people is that you do the things that the vast majority of us are either too selfish, too stone hearted or too scared to do ourselves to make this world what we all envision it could be.

When I was born, you gave me your middle name. I view this as an honor, sir, and will do my best to pick up the slack until you can come back home to us.

Q. Thank you.

MR. KIRKCONNELL: Questions from the Court or counsel?

THE COURT: No. Thank you.

MR. KIRKCONNELL: The last short witness, Bob Irey, on a different subject.

THE COURT: Okay.

THE COURTROOM DEPUTY: You've already been sworn.

BOB IREY,

having been previously duly sworn, was examined and testified as follows:

MR. KIRKCONNELL: Your Honor, you've already met Mr. Irey. He's already under oath. I've asked him just to share a single vignette of his childhood with his brother with the Court.

THE COURT: Okay

DIRECT EXAMINATION

BY MR. KIRKCONNELL:

Q. Bob.

A. Got it.

your Honor, the year was 1976.

Q. Bob, speak closer to the microphone, please.

A. Your Honor, the year was 1976. My brother was a senior in high school, and I believe I was in the seventh grade. I was big for a seventh grader, about the size I am now.

Bill had a really cool leather sports coat, soft leather, and I took a fancy to it. Without his knowledge, I wore it to school fairly regularly. One day I came home from school and saw his leather jacket laying on the table and it was just covered with blood. I said, "Man." My knee jerk reaction was, "What happened to Bill?" And what happened to Bill was on his way home from school, he came upon an accident where a woman was pretty seriously hurt, and in Bill's style, he immediately took off his jacket, put it around her because she was shivering bad. Without a thought, take off the jacket and comfort the lady.

I remember my reaction to it: "Why did you do that? You ruined your jacket." Typical Bill, she needed it. She needed it.

Q. Take a minute. Take a drink of water.

THE COURT: I tell you what, we're going to have to take a recess before we conclude, so why don't we go ahead and take about ten minutes.

MR. KIRKCONNELL: Okay.

(A recess was taken.)

THE WITNESS: Your Honor, I'm sorry about that.

THE COURT: That's all right.

A. To get to the point of the story, Bill's comeback to the use of the jacket: "She needed it; I didn't." It was probably the first time that I recall in my life where it really just sunk in, Bill's random acts of kindness, helping others without concern as to what it's going to cost. What's the cost? It doesn't matter. If somebody is in need you can count on Uncle Bill He was going to be there.

Those types of random acts of kindness have been shared by many within the family My children have learned it. It's been instilled in them, and it's come directly from , you know, the displays of ongoing acts of kindness that Bill has displayed through his life. and I could go on and on. I have a list them here, but I think you've got the picture of who Bill Irey is, the type man he is, the goodness of his heart, the goodness of his soul. thank you.

Q. Thank you.

MR. KIRKCONNELL: Any questions from the court or counsel?

THE COURT: Ms. Hawkins, any?

MS. HAWKINS: No.

THE COURT: Thank you, sir.

MR. KIRKCONNELL: Your Honor, I have no more witnesses, but there are two other items I would like the Court to consider. One is a letter from Mr. Irey, which I presented to the court today and which I presented to Ms. Hawkins.

I also would like – I believe we can stipulate with Ms. Hawkins for the government and the agent that Mr. Irey attempted to do substantial assistance on the actual charge that he was on by helping – attempting to help them identify people, where all ties stuff happened and all that kind of stuff; and even thought it did not rise to the level of substantial assistance where they would file a rule 5(k)1, I believe under the cases of United States versus Doe, 398 Federal 3d. 1254, and the United States versus Davis at –

THE COURT: Doe is a Tenth Circuit case, which has a different procedure that the Eleventh Circuit, where you have to give notice of an intention to depart. Apparently there was a notice of intention to depart upward in Doe; and while the court in that case felt it may not be appropriate to consider proposed assistance for downward departure, there's nothing that precluded it in consideration when looking at an upward departure, which is totally inapplicable here.

MR. KIRKCONNELL: There's another case attached to that, Your Honor.

THE COURT: I saw that, a Tennessee case.

MR. KIRKCONNELL: Your Honor, I just wanted the Court to consider the letter from Mr. Irey, and we do have some argument after you've looked at that.

THE COURT: All right. I've read the letter which is Exhibit 4.

MR. KIRKCONNELL: Your Honor, do you wish us to argue first or the state – the government?

THE COURT: Yeah. Is there anything else you wish to say in mitigation? Obviously, I'll be happy to hear from Mr. Irey as well.

MR. KIRKCONNELL: Okay. Your Honor, we would ask the court to consider – as the Court correctly stated initially, the options open to the Court here, Because of the statue, are a minimum of 15, a maximum of 30. We are aware of the recommended sentence by the guidelines. They are only one factor to be considered

As U.S. Code – 18, U.S. Code, 3553 (a) (1) provides that the Court can consider the nature and circumstances of the offense and the history and characteristics of the defendant, and that the sentence shall be sufficient but not greater than necessary, we submit, Your Honor, that a 360-month sentence here is greater than necessary for Mr. Irey in light of the mitigation that's been presented.

There is no way to minimize, and we would certainly not try to minimize, the gravity of the acts with which Mr. Irey is charged. You've heard the mental health professionals tell you that this is a compartmentalized area of his whole being that is a result of his pedophilia, which is a diagnostic criteria for psychiatric care.

What I gathered from Dr. Shaw's testimony and the best I could from Dr. Berlin's report is that the behavior of a pedophile is not totally volitional, that is, it is dictated in some degree by the disease itself. this is contained in Dr. Berlin's report and was testified to by Dr. Shaw.

The Court certainly has the legal authority to impose a sentence in this case below the 360-month maximum; and there are three cases which this Court, I'm sure, is very well aware of and they are mentioned in our memorandum of law, the most recent of which is the McBride case, decided in December of '07, which I believe is from this court, which is remarkably similar to Mr. Irey's case. there's differences in facts in every case, but it's remarkably similar. In some ways, Mr. McBride was perhaps more culpable even than Mr. Irey in that he had a prior sex case. He had also admitted apparently to doing some things in a polygraph that were pretty extensive child molestation, involved multiple children, many images, and he too, was diagnosed as a pedophile.

In that case, according to the reported case, the recommended sentence was 151 to 188 months; and this court, I believe, sentenced Mr. McBride to 84 months and that was upheld on appeal.

Another case is the Gray case, which is cited in our memorandum. Mr. Gray was 65 years of age at the time of his sentencing for a similar crime; and in addition to everything else, Mr. Gray failed to appear for sentencing. In that case, there were many images. There was an aggravator of distribution. In that case, as in Mr. Irey's case, Mr. Gray cooperated and accepted responsibility. The sentence in that case was approximately one half of what the recommended guideline sentence was.

The third case mentioned in the memoranda is the White case. Mr. White, like Mr. Irey, in fact exactly like Mr. Irey, was 51 years of age at the time of his conviction and sentencing, as is Mr. Irey today. the Court considered the defendant's age, lack of

record, medical condition, and followed the Gray case in sentencing him to a much reduced – much less than the maximum which could be considered.

I think what you've heard today is a some of what a snapshot of a much bigger part of Bill Irey's life than the crimes he committed in terms not only of time but of effort. He has lived, other than this disease and this addiction, an exemplary life in terms of his taking care of his family, taking care of his community, setting an example, and doing what one of the witnesses has referred to as random acts of kindness.

Mr. Irey is not going to go home from this courtroom today. He's going to go to the Bureau of Prisons. He understands that. He understands he needs to be punished. He understands he will be punished, but he asks the Court to give him some consideration for the rest of his life, separate and apart from the crime he has committed.

If he were to be sentenced to 360 months and serve that entire time, he would be approximately 81 years old, if he survived that long.

As you can see, he has strong family support. He has young family members who care about him, in addition to his contemporaries. We would ask the Court to impose as U.S. Code 3553 requires, a sentence which is sufficient but not greater than necessary, and we would submit something between 15 and 20 years here with up to lifetime supervised release.

You've heard that he's treatable. You've heard that he's a low risk of recidivism. That would make him 66 or 71 when he got out, if he served the entire sentence. He would be an old man. We ask

you to consider a sentence less than the guideline's recommended sentence.

THE COURT: Thank you, Mr. Kirkconnell. Does your client wish to say anything?

MR. KIRKCONNELL: Let me see, Your Honor. I think he would like to briefly apologize, Your Honor, if that's okay.

THE COURT: Whatever.

MR. KIRKCONNELL: From the witness stand?

THE COURT: No. Wherever he's comfortable.

THE DEFENDANT: Your Honor, I would like to first apologize to the government agents that have had to get involved in my horrible deeds, the federal attorney's office, and I would like to apologize to this Court.

I'd like to apologize, although they're not here, to the children that I have harmed over the last several years of going to Cambodia. I would like to apologize to my family for what I have put them through. I love them. I will be always there for them in spirit, by telephone. My friends and family, I would like to thank them for their support.

I would like to apologize to my employees, that I've pretty much hurt them. I've hurt a lot of people and I can't undo that, but I can learn from that and I'm willing to learn. Thank you, Your Honor.

THE COURT: Thank you, sir.

Ms. Hawkins.

MS. HAWKINS: Your Honor, it's pretty hard to square what we've heard here today with what we know about this case. Let me start by saying that the defendant is not being prosecuted for

being a pedophile; he's being prosecuted for the acts that he committed. He did not have to go to Cambodia. As an alcoholic doesn't have to drive a car, a pedophile doesn't have to put themselves in a brothel in Cambodia, which this defendant did for years and years and years, Your Honor.

I would ask the court to go back to the PSR. I would not like to embarrass the people here by – and I'm not going to read the descriptions, a selected few of these photographs that the defendant took, that the defendant performed in; but on pages four an five of the PSR, the descriptions of writing filth on children's bodies, inserting objects into them, binding them up and tying them up, treating them – posing them as trophies, and having several of them engaging in acts with him and with other children at the same time, this is not run-of-the-mill child pornography, by God, if there is such a thing. This is not a possession case, like the McBride case.

This is a production case, and the defendant clearly had two different parts of his life going on; but in this one, he was the star, the writer, the director and, at the end, a person who ruined, just absolutely and forever ruined over 50 children's lives.

And I would like to ask the court – these are not – this is not pornography. These are pictures of about 50 of these children. I would like the court to – I've shown this to the defense – to look at these babies' faces.

THE COURT: Okay.

MS. HAWKINS: As the court can see, some of these children are four or five, six years old. They're babies, Your Honor. Their pictures will forever be out there online. They will be victimized

over and over again, and they know that those pictures are out there. Their lives can never be the same.

When this case was uncovered, the National Center for Missing and Exploited Children called the agents and called us and said, "Oh, my God, you've found the person who produced the 'pink wall' series." If you look at these pictures, in many of them there's a pink wall. that's the location for the abuse that this defendant perpetrated on these very young children. It was infamous on the Internet, and it's turning up even in cases now, that we're finding more and more of the pink wall series of these young children.

Your Honor, in some of the – in some of the photographs, the defendant is smiling as he perpetrates this abuse. How can we square this with the stories we've heard today? How can you treat a dog better than you treat a human being, a defenseless baby? It makes no sense other than there's something really, really bad about the defendant. I've heard good things that he's done, but there's some really very bad stuff inside and it has to be punished, Your Honor.

The offense has to be considered. The victimization has to be considered. The message we send to people who would do this has to be considered. And as the defendant himself has admitted it's not even just child rape and child molestation, but dealing with prostitutes, lying when he doesn't have to. I believe he admitted in his statement to stealing. There's a person who does – who lies and steals and hurts other people that's been living here among us as well, Your Honor, although he kept it hidden.

But when you look at these images of torture, and there's really no better word for it, of these small children and recalling that this was a huge collection of child pornography, there were over 1200 images, Your Honor, of some of the most egregious images that the agents have ever seen, and that this defendant was going to these brothels and going on these trips for many years, not just one time, not just once in one year, but many years, many times and was paying up to $1500 for the rights to particular children so that they would be available to him so that he could make use of them, whatever use he cared to make, Your Honor, given the viciousness of these crimes, the United States is asking for the 30-year sentence – that is the most this Court can impose – and justice for these children who cannot plead on their own behalf. Thank you, Your Honor.

THE COURT: Thank you, Ms. Hawkins. Anything further from the defendant?

MR. KIRKCONNELL: No, Your Honor.

THE COURT: Well, as I've often said and will say again, sentencing is not an easy task. It's the hardest thing I have to do in my job, and it's particularly difficult in cases like this.

As you know, I'm dealing with a statutory minimum of 15 years. So that's the floor, and the ceiling is 360 months, and the ceiling also happens to be the guideline score.

With respect to the way we sentence people today post-Booker, Kimbrough, is I take into account the guideline score and consider that as a benchmark in terms of imposing an appropriate sentence in a given case, and that benchmark needs to be kept in mind throughout the analysis of the 3553(a) factors.

However, the guideline sentence is not mandatory; it is advisory. It's an important element of my sentencing calculus. But what I need to do after determining the guideline score is to look at the other 3553 (a) factors on an individualized basis in an effort to determine an appropriate sentence for this particular case.

The first thing I need to do is consider the nature and circumstances of the offense, and I cannot quarrel with Ms. Hawkins' description of that. The conduct here was horrific. The victims were numerous and perhaps the most vulnerable of the world's society. So I don't think there's any question but we're dealing with here with an offense that rises to the very top in terms of its seriousness and its effect on other human beings.

These young children were victims who may never never overcome their abuse. I recognize, of course, that Mr. Irey and his family and friends are also victims here; and society at large is a victim because, as Dr. Shaw indicated, with every new development in human history, there seems to come good and bad with it; and with all the good of the Internet, perhaps one of the bad features of it is that it has made possible what Dr. Shaw describes as an epidemic of child pornography. And, unfortunately, we here in the court system witness that and have to deal with it; and our government, in an effort to deal with it, has imposed – has criminal penalties, very harsh sentences for conduct like this.

So in terms of the characteristics of the offense, the seriousness of it itself the long-standing, long-term engagement in it certainly does not mitigate in favor of any leniency.

But next I need to look at the history and characteristics of the defendant. By all accounts, Mr. Irey has been a good husband and father for his wife and children and a good friend to his friends and a good person to his community. The lies and thefts, I think, referred to by Ms. Hawkins were essentially part of his effort to cover up his illness, because I think other than the acts of Mr. Irey, there's no indication that he has engaged in any other sort of criminal conduct or conduct representing poor character.

Also in terms of characteristics of the defendant, I think we're just beginning to learn what pedophilia is and how to deal with it. I think if you look at the reports of the mental health people here and into the literature, which I have done, Mr. Irey's acts that bring him here today, I think it's safe to say, were not purely volitional. I think they were due in substantial part to a recognized illness. And while it does not excuse his conduct and he will still be held accountable for it, I think it would be inappropriate to ignore that fact.

I also think it's appropriate to credit the opinion of the mental health professionals who indicate that Mr. Irey is pursuing treatment and is doing so apparently successfully and, in the view of the mental health professionals, is treatable and has a low risk of recidivism.

Of course, all of that is somewhat academic because by the time he gets out of prison, he'll be most likely at an age where recidivism would be unlikely, just from a physiological standpoint.

Mr. Irey obviously has a very loving family and I know he's proud of his family and deserves whatever credit he should take for having produced

these people who have come here today to speak for him. And I know it was difficult for the family, but I think that your support is important and says a lot, not only about your family, but about Mr. Irey himself.

Another aspect of the defendant's character, as I have alluded to, of course, not his character but his individual characteristics, is his age. As I indicated, even the minimum sentence here, he's going to be an old man. I guess that makes me an old man, but he will certainly be an older man when he gets out of prison; and that's, I think, a factor to take into account.

There are other aspects of the statute that essentially are subjective in nature. Of course, adequate deterrence to criminal conduct. I mean, a serious sentence is hopefully going to deter others from conducting similar affairs, although when we're dealing with an illness like this, I'm not sure that that rationally follows. But, nevertheless, deterrence is an appropriate consideration and a stiff sentence is in keeping with the seriousness of this offense.

As far as protecting the public from further conduct of this defendant, for the reasons I've indicated, I think that militates against a 30-year sentence, given his age, given the fact that he apparently recognizes now, from everything I've seen he recognized the condition that has led him to commit these acts and to put himself and his life and his family's life in the order that it is. He's taken the first step toward rehabilitation and appears to be amenable to treatment and also, according to the mental health professionals, is of low risk of recidivism. So I don't think society needs further

protection from him, at least beyond the statutory minimum sentence.

As often happens in these cases, my judgment – and I am a fallible human being. So what I do is not necessarily right. I just do the best I can under the circumstances. It comes down to my view of what promotes respect for the law and provides just punishment. And here, as indicated, I think that a 30-year sentence, given the personal factors that I have touched upon, is greater than necessary to accomplish the statutory objectives.

On the other hand, in light of the seriousness of the crimes, I think a sentence above the mandatory minimum is called for.

So having said all that, it's the judgment of the Court that the defendant, William Irey, is committed to the custody of the Bureau of Prisons to be imprisoned for a term of 210 months.

Upon release from imprisonment, Mr. Irey, you'll be placed on supervised release for a term of life. The mandatory drug testing requirement of the Violent Crime Control Act are imposed. While on supervised release, you must comply with the standard conditions adopted by this court.

In addition, I'm going to require you to participate in a substance abuse program and to follow your probation officer's instructions in that regard. You must also participate in a mental health program specializing in sex offender treatment and follow you probation officer's instructions in that regard as well.

You must register, as appropriate, with any state offender registration agency and cooperate with your probation officer with respect to complying with that directive.

I'll impose the standard terms concerning risk control, that is, no direct contact with minors under 18 without the written approval of your probation officer, prohibition for possessing, subscribing to, viewing any video or magazines, literature otherwise depicting children in the nude or sexually explicit positions. you shall not possess or use a computer with access to any online service without written approval of your probation officer.

Also, I'm going to impose a search requirement, that you submit to a search of your person, residence place of business or any other area under your control at a reasonable time and in a reasonable manner based on any reasonable suspicion by your probation officer of contraband or evidence violating these terms of supervised release.

You must cooperate with the collection of DNA.

I'm not going to impose a fine. You are ordered, however, to pay a special assessment of $100, which shall be due immediately.

It's ordered that you shall forfeit to the United States those assets identified in your Plea Agreement that are subject to forfeiture.

Ad indicated, the court has imposed a sentence below the applicable guideline sentence for the reasons indicated.

The court accepts the Plea Agreement.

You are remanded to the Marshal to await designation by the Bureau of Prisons.

In the meantime, he's in this program, right? Is he going to stay in this program until he's shipped off?

MR. KIRKCONNELL: Your Honor, we had agreed with the government to allow him to remain

in the program and voluntarily report at his own expense to the designated institution.

MS. HAWKINS: Your Honor, the understanding is that he will remain in complete lockdown with no access or egress in or out of the facility, and that his reporting to the Bureau of Prisons would likewise be in a lockdown mode, that is, the understanding is that he will not be free or at liberty at any time.

THE COURT: Right. So that was my concern this volunteer stuff. I mean, I want him to continue in this program, which is the best place for him and for the government right now; but when it's time for him to report –

MR. KIRKCONNELL: Your Honor, we have Mr. Mike Andrews here today, who has been the transportation for him, and he understands his obligations. He will be the one taking him to the designated institution.

THE COURT: Okay. So I don't want any misunderstanding about that. We don't need the Marshals to do it, in other words.

MS. HAWKINS: He's been bringing him to and from court, Your honor, with at least two people, is my understanding, and that he is fully secured. As long as that's a condition and he's paying for it, then we wouldn't object.

THE COURT: Okay. Well, we'll continue with that condition, then, up through and until he's in the possession of the Bureau of Prisons or in the custody of the Bureau of Prisons.

Is there any objection to the sentence or the manner in which the Court has pronounced sentence?

MS. HAWKINS: Your Honor, the United States does object to – specifically to the extent of the variance, which is almost half, and based on the factors adduced in the record, particularly the seriousness and long-term nature of the offense, that the extent of the variance would be unreasonable.

Mr. KIRKCONNELL: No objection from the defense, Your Honor.

THE COURT: Well the sentence is more like 60 percent of the guideline, not half. But, anyway – well, Mr. Irey, to the extent permitted by your Plea Agreement, you're now advised that you have the right to appeal this sentence within ten days from today or the date the judgment is recorded, whichever is later. Failure to appeal within the ten-day period will be a waiver your right to appeal.

The government can also appeal this sentence.

You have the right to the assistance of counsel in taking an appeal. If you cannot afford a lawyer, one will be provided for you.

Are there any questions, anything else we need to consider before we adjourn?

MS. HAWKINS: No, Your Honor.

MR. KIRKCONNELL: No, Your Honor

THE COURT: All right. Well, thank y'all. We'll be in recess.

(Proceedings were terminated at 3:20 p.m.)

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Reporter's Certification

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Diane Peede, RMR, CRR

Official Court Reporter

United States District Court
Date: February 14, 2008
Middle District of Florida

[PUBLISH]

FILED: August 12, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10997

UNITED STATES OF AMERICA, Plaintiff-Appellant,

versus

WILLIAM IREY, Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

(Opinion March 30, 2009, 563 F.3d 1223, 11th Cir. 2009)

(August 12, 2009)

Before DUBINA, Chief Judge, and TJOFLAT, EDMONDSON, BIRCH, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON, and PRYOR, Circuit Judges. *

BY THE COURT:

A MEMBER OF THIS Court in active service

having requested a poll on whether this case should be reheard by the Court sitting en banc, and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

* Senior United States Circuit Judge James C. Hill has elected to participate in this matter pursuant to 28 U.S.C. § 46(c).

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, NW
Atlanta, Georgia 30303

John Ley
Clerk of Court

www.ca11.uscourts.gov

August 1, 2010

MEMORANDUM

We are pleased to enclose revisions to the Eleventh Circuit Rules and Internal Operating Procedure (IOPs) that took effect on August 1, 2010.

Some of the revisions:

- add a reference to the Court's practice that the Clerk will make a docket entry – available to litigants via PACER – when the mandate will not issue on the ordinary date because it has been held by a judge. IOP 6, Requesting a Poll on Court's Own Motion, following FRAP 35.

- incorporate the Court's practice with respect to issuance of the mandate when the Court rules on a petition for a writ of mandamus or prohibition or other extraordinary writ. 11th Cir. R. 41-3 and 11th Cir. R. 41-4.

The Rules and Internal Operating Procedures of the Eleventh Circuit are available on the Court's

Web site. We welcome comments and suggestions concerning our local rules and internal operating procedures.

You are welcome to print a copy of these rules if you wish to have a paper copy. Use of a color printer will provide you with a two-color copy of the rules. A List of Replacement Pages on the following page indicates the pages that have changed since the last revision.

John Ley
Clerk of Court

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:06-cr-237-Orl-31DAB

UNITED STATES OF AMERICA
-vs-
WILLIAM IREY

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the Unopposed Motion for Continuance of Resentencing Hearing Pending Review in United States Supreme Court (Doc. 80). As the motion's title suggests, the parties seek to have this Court delay its resentencing of the Defendant, William Irey ("Irey"), on the chance that the Supreme Court will grant his petition for writ of certiorari, due to be filed on October 27, 2010. As things now stand, this Court is obligated by the July 29, 2010 decision of the United States Court of Appeals for the Eleventh Circuit (henceforth, the "July 29 Order") to impose a 30-year sentence on Irey. Given that Irey is in the early stages of serving the 17-and-a-half-year sentence originally imposed by this court, there is no pressing need to impose the longer sentence – a fact apparently recognized by the Government, which does not oppose the motion. For these reasons, the motion will be granted, and the resentencing will be continued.

* * *

Under normal circumstances, that would be the end of the matter. But these are not normal circumstances. The July 29 Order raises a host of important issues, a fact recognized both by the Defendant in the instant motion and by the appellate court in the order itself. The pendency of the petition for a writ of certiorari provides the Court with a rare opportunity to respond to certain aspects of the appellate decision, prior to its possible review by the Supreme Court, with information that only the undersigned possesses. In addition, the July 29 Order has certain implications that affect the courts that are tasked with the imposition of criminal sentences – implications that might not be apparent to the parties themselves. The Court believes that a discussion of these points may assist the Supreme Court in determining whether the petition ought to be granted.

It is for these reasons, and not out of any disrespect for the Circuit Court's authority to reverse the sentence I imposed, that I will take this opportunity to respond to certain portions of the July 29 Order.

* * *

Background

On December 13, 2006, a grand jury returned an indictment charging Irey with one count of violating 18 U.S.C. § 2251, which proscribes sexual exploitation of children. (Doc. 1 at 1). In particular, Irey was charged with violating subsection (c) of that section, which provides that

> (1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).
> (2) The circumstance referred to in paragraph (1) is that —
> (A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or
> (B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

18 U.S.C. § 2251(c). With certain exceptions not applicable in this case, the penalty for a first-time offender under this section is a prison term of not less than 15 years nor more than 30 years. 18 U.S.C. § 2251(e). On July 10, 2007, Irey pled guilty to the single count with which he had been charged. (Doc. 49).

On January 29, 2008, Irey, then 50 years old, appeared before this Court for sentencing. As set forth in the Presentence Investigation Report ("PSR") prepared by the United States Probation

Office, a straight application of the United States Sentencing Guidelines ("USSG") would have resulted in a guideline sentence of life imprisonment. Because the statute provided for a maximum sentence of only 30 years, the guideline sentence was automatically reduced to that amount.

The Court conducted a lengthy hearing, which included evidence of psychological evaluations conducted by two mental health professionals (and live testimony from one of them), plus live testimony and recorded statements from Irey's wife and three sons, as well as other members of Irey's family and friends, plus argument from the prosecutor and defense counsel.[1] Afterward, I sentenced Irey to 210 months – 17 and a half years – in prison, plus a lifetime of supervised release and other restrictions.

The Government appealed. Initially, a three-judge panel unanimously affirmed the decision, finding that the Government had failed to establish that the sentence was unreasonable. *See United States v. Irey*, 563 F.3d 1223 (11th Cir. 2009) (henceforth, "Irey I"). Four months later, the Circuit Court *sua sponte* decided to rehear the case and vacated the panel's opinion. *See United States v. Irey*, 579 F.3d 1207 (11th Cir. 2009) (*en banc*) (henceforth, "Irey II"). After additional briefing and oral argument, a sharply divided court reversed and remanded with instructions to impose the maximum sentence permitted by the statute – 30 years. *See United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (*en banc*) (henceforth, "Irey III").

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[1] The Court also considered sentencing memoranda submitted by the parties.

The Sentencing Factors

In vacating the sentence I had imposed, the Circuit Court found no procedural irregularities, and noted that my factual findings and explanations were among the most specific and detailed that they had encountered in reviewing a sentence. *Irey III* at 1195. Instead, the decision to vacate the sentence was based on substantive grounds. Accordingly, the discussion that follows will address the sentencing factors of 18 U.S.C. § 3553(a) in the context of substantive reasonableness.[2]

18 U.S.C. § 3553(a)(1) – the Nature and the Characteristics of the Offense and *18 U.S.C. § 3553(a)(2)(A) – the Seriousness of the Offense*

Section3553(a)(1) and § 3553(a)(2)(A) contain similar requirements that the sentencing court begin its determination of an appropriate sentence by considering the nature and seriousness of the offense. As charged by the Government, the offense committed by Irey was the production of child pornography outside the United States for transportation into this country, in violation of 18 U.S.C. § 2251(c). The offense conduct is set forth in paragraphs four through 18 of the PSR. Paragraphs

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[2] As noted by the Circuit Court, no one has suggested that the factors set forth in § 3353(a)(2)(D) (the need to provide training, medical care, or other treatment), § 3553(a)(3) (the kind of sentences available), or § 3553(a)(7) (the need to provide restitution) are relevant in this case. *Irey III* at 1217 n.36. Accordingly, they will not be addressed in this opinion.

four through 17 discuss the investigation of internet child pornography that led agents to Irey, and the execution of the search warrant that revealed the images depicting Irey engaging in sex acts with children. Those images are described in paragraph 18 of the PSR.

I recognized that Irey's offense was serious – indeed "horrific" – in that the victims were numerous and vulnerable, and the conduct occurred over an extended period of time. (Tr. at 58).[3] Accordingly, I concluded that the seriousness of the offense did not mitigate in favor of any leniency. (Tr. at 58). However, in the opinion of a majority of the Circuit Court, the 17-and-a-half-year sentence was substantively unreasonable, primarily because of the nature and extent of Irey's criminal conduct. *Irey III* at 1166. In other words, the Circuit Court concluded that I gave insufficient weight to the seriousness of the offense.

Perhaps the disconnect between my judgment and that of the Circuit Court is a matter of perspective. The offense, as I viewed it, was the production and transportation of child pornography, as charged. The circumstances surrounding that offense were certainly relevant, and I considered them. As I said during the sentencing hearing, "These young children were victims who may never, never overcome their abuse." (Tr. at 58). Conversely, the primary focus of the majority in *Irey III* was on Irey's sexual conduct – the rape, sodomy

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[3] References to the transcript of the sentencing hearing will be given in the format "(Tr. at [page number])". A copy of the transcript was filed in the instant case at docket number 65.

and torture of children – with the child pornography production almost an afterthought. *See Irey III* at 1166 (graphically detailing Irey's sexual conduct, then adding that he "also . . . starred in [and] produced . . . child pornography"). *See also Irey III* at 1209-10 (describing Irey's production and distribution of child pornography as "additional criminal behavior"). Such a difference in perspective can certainly lead to a different conclusion as to the seriousness and weight to be accorded Irey's criminal conduct.

There are a number of things in the *Irey III* decision with which I take issue. However, I have no disagreement with the fundamental proposition underlying the majority opinion: that Irey's conduct, his filming (and subsequent distribution) of himself having sex with dozens of children, under the most revolting of circumstances, was utterly vile. The bottom line for the majority appears to be that Irey raped and tortured fifty or more children, and that this fact so outweighs every other sentencing consideration that only a maximum sentence could be reasonable. But Irey was not charged with 50-plus counts of rape and torture; he was charged with, and pled guilty to, a single count of violating 18 U.S.C. § 2251(c), which prohibits foreign production of child pornography for distribution in the United States. The horrifying circumstances surrounding the production of this child pornography were certainly relevant, and I tried to take those circumstances into consideration when crafting Irey's sentence. But the implicit holding of the majority opinion is that I was obligated to sentence Irey for the surrounding conduct, rather than the particular crime with which he was charged.

In any event, in the majority's view, the heavy weight to be accorded to the seriousness of Irey's offense trumps any mitigating factors that could support a below-guideline sentence. That said, I will turn to the other statutory factors.

18 U.S.C. §3553(a)(1) – The History and Characteristics of the Defendant

The PSR describes Irey as a good husband and supportive father of four children, who remain supportive of him.[4] He has no prior criminal record. The PSR also notes that Irey was residing at a psychiatric hospital and receiving intensive treatment for his "sexual addiction." (PSR, ¶ 63). A psychological evaluation performed by Dr. Fred Berlin was attached to the PSR. In it, Dr. Berlin concluded that Irey had a psychiatric disorder known as "heterosexual pedophilia" and was in need of "appropriate professional treatment." (PSR, ¶ 63).

Dr. Ted Shaw, who also performed a psychological evaluation, testified at the hearing. Dr. Shaw stated that Irey had a "long-standing problem with sexual obsession," which in lay terms could be described as "sexual addiction." (Tr. at 11). Dr. Shaw testified that he had found Irey to be "amenable to treatment" and that he had made "observable progress." (Tr. at 12).

According to the majority opinion, my biggest error in judgment with regard to this factor resulted from a vastly mistaken, too-sympathetic view of Irey's character. In reaching this conclusion, the

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[4] A number of Irey's friends and family members testified at the hearing and corroborated this point.

majority focuses on an extemporaneous remark I made while imposing the sentence, in which I referred to Dr. Shaw's testimony that the Internet has fueled an epidemic of child pornography. *Irey III* at 1198. Had I prepared a written sentencing opinion, I would not have described Irey as one of the "victim[s]" of this phenomenon.[5] However, in speaking from the bench, I made an ill-advised word choice. Relying on that single word, the majority states that I made an "implicit finding" that the internet caused Irey to sexually abuse children, that I (also apparently implicitly) recast Irey from "criminal" to "victim," and that somehow I found that he was on the same "moral plane" as his young victims. *Id.* at 1198-99. I made no such findings, implicitly or explicitly. And to suggest that I viewed Irey as not responsible for his conduct is absurd. Yet, based on findings I did not make and views I do not hold, the Circuit Court concludes that I saw Irey as a victim and that this perception "permeated [my] reasoning and tainted [my] weighing of the 3553(a) factors." *Id.* at 1199. That simply is not true.[6]

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[5] I was attempting to point out that society at large (including Irey and his family) had suffered harm resulting from the easy availability of this type of material. I concede, in retrospect, that my effort was clumsy. However, in 2009, I sentenced 51 individuals. I could not possibly write an opinion for every sentence I impose – though, in hindsight, I should have done so in this case.

[6] Common sense should suffice to establish that I could not and did not find any sort of equivalence between Irey and his victims. But if not, a review of the transcript should do so. Such a review shows that I made that remark while discussing the effects of the internet in the context of an assessment of the nature and circumstances of the *offense*, not the history and characteristics of the *defendant*.

I engaged Dr. Shaw in a colloquy in an effort to understand the nature of pedophilia from the standpoint of a mental health professional. He described it as a treatable disorder, stating that it is "something that is within you and you have some tendency towards it." (Tr. at 17). He went on to say that the Internet has fueled an "epidemic of pedophilia." (Tr. at 18). Later in the proceeding, I carried this notion forward by noting the Internet's effect on the increase (epidemic) of child pornography. Reflecting on the report and testimony of Dr. Berlin and Dr. Shaw, I also said that Mr. Irey's acts were not *purely* volitional in that they were the product of a recognized "illness."[7] I concluded that thought by saying, "And while it does not excuse his conduct and he will still be held accountable for it, I think it would be inappropriate to ignore that fact." (Tr. at 59).[8]

(Tr. at 58). And after doing so, and after mentioning the severity of the penalties we impose for conduct such as Irey's, I explicitly found that nothing in this offense mitigated in favor of any leniency. (Tr. at 58). Thus, two sentences after I clumsily referred to Irey as a victim, I made a no-leniency finding. (Tr. at 58). This simply does not square with the majority's analysis of what motivated my choice of sentence.

To the same end, if I truly considered Irey to be a victim rather than a criminal, one would expect that I would have at least mentioned this point during my analysis of the history and characteristics of the defendant (Tr. at 58-60). But that analysis is devoid of any reference to victimhood – because I did not consider Irey to be a victim in any sense that could influence my sentencing decision.

[7] In retrospect, I should have used the term "psychiatric disorder known as heterosexual pedophilia."

Irey did possess some characteristics and history that I thought were relevant to sentencing, and I noted them in my remarks. But the majority brusquely dismisses any evidence of Irey's positive qualities as a husband, father and friend, asserting that "[n]o one who committed such heinous crimes has good character." *Irey III* at 1203. The majority even cites Ted Bundy, who apparently spent some time working at a suicide prevention line, as an example. *Id.* By this logic, once a defendant's criminal conduct reaches a certain point, nothing else can be considered in imposing a sentence. Among other things, such an approach would render meaningless the statutory obligation to consider the characteristics and history of the defendant.

In addition, contrary to the majority's assertions, I did not find that Irey "had good character." Rather, I recognized that, by all accounts, he had been a good husband, father and friend, and except for the offense conduct (and its cover-up) he had not engaged in any other sort of criminal conduct or conduct representing poor character.[9] These facts were uncontroverted and I

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[8] The Circuit Court concluded that I made an implicit finding that it was the Internet that caused Irey to sexually abuse children. *Irey III* at 1198. I made no such finding, express or implied.

[9] The majority makes much of the fact that Irey cheated on his wife with prostitutes, including doing so on a weekly basis in his hometown. *Id.* at 1204. Though unsavory, this behavior is not a federal crime, and his wife and family were apparently willing to forgive him for it. While certainly not evidence of good character, it may be viewed as a manifestation of what Dr. Shaw referred to as Irey's "sexual addiction."

gave them some weight, as I believe the statute requires me to do.[10]

I also considered Irey's age. He was fifty when he was sentenced, and I noted that he would be an old man – 67 years old, to be precise – when he was released from prison. (Tr. at 60). The Circuit Court held that it was unreasonable to consider this fact. *Irey III* at 1205. The age of the defendant is clearly one of the personal characteristics that may be considered under § 3553(a). The real issue is how much weight should be given to it. I chose to give some weight to Irey's age, so that he and his family might have some hope of life together after his prison term. The majority finds it was unreasonable for me to do so. In its view, Irey's age is not relevant, and if a guideline sentence is effectively a life sentence, this makes no difference The majority's pronouncement on this point – that "[w]e fail to see how those facts show that Irey is any different from any other person who commits

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[10] The majority also concludes that "no significant weight can be given" to Irey's positive qualities as a husband and father, because he cheated on and lied to his wife, and because his family suffered financially and emotionally as a result of his "depraved criminal misconduct." *Id.* I understood this suffering because I heard the testimony and I saw the emotion. Yet Irey's family members testified that they remain supportive of him, and there is no evidence to the contrary. Despite this, the Circuit Court would have me discredit this fact because, in its view, his family was detached from reality, and because any credit due Irey was outweighed by his criminal conduct. *Id.* at 1205. Simply put, I gave some weight to this evidence, while the Circuit Court would give it none.

horrendous crimes in middle age and faces a long prison sentence" is difficult to square with any notion of deferential review.

The majority attempts to undermine my finding as to Irey's age upon release by deducting the two and a half years of "gain time" he might earn in prison pursuant to 18 U.S.C. § 3624(b). *Id.* The United States Sentencing Commission does not use this calculation in the data that it compiles, nor am I aware of any sentencing case law that does so. Introducing this factor distorts comparisons between different defendants' sentences, likely rendering them meaningless. Despite this, the majority appears to have concluded that this modified figure is more relevant to a sentencing determination than the actual sentence imposed.

Such a conclusion has significant implications at the district court level. Are sentencing judges now supposed to calculate the possible "net" sentence to determine whether it falls within the guideline range, or to carry out any of the remainder of the § 3553(a) analysis? And how would we do so? Are we to assume that everyone we sentence will earn gain time, and adjust our sentences to take this into account? Stated differently, should judges impose longer sentences because of the "threat" that the defendant will behave himself in prison? Will an otherwise unreasonable, above-guideline sentence be deemed reasonable if the defendant may earn enough gain time to bring the "actual" sentence within the guideline range?

18 U.S.C. §3553(a)(2)(B) – Deterrence

This subsection deals with the need for the

sentence to afford adequate deterrence to criminal conduct, and should be considered in the context of the parsimony principle.[11] As the majority noted, the more serious the crime and the greater the defendant's role in it, the more important it is to send a strong and clear message that will deter others. *Id.* at 1212. In this case, I believed that a 17 and a half-year sentence sent a strong message. As described in the panel opinion, "no serious person should regard it as a trifle." *Irey I* at 1226.

Nonetheless, the majority concluded that I failed to give enough weight to this factor – a conclusion that follows, almost by necessity, from the

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[11] The majority opinion takes issue with any use of "parsimony principle" to describe § 3553(a)'s requirement that one impose a sentence "sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)" of that subsection. *Id.* at 1196-97. The majority asserts that the term is inaccurate in that it ignores § 3553(a)'s command that the sentence be "sufficient" in favor of the command that it not be "greater than necessary," and accuses those who employ it of doing so because they hope "to slant the discussion toward shorter sentences by emphasizing only that part of the twin requirements." *Id.* at 1197.

Without purporting to speak for all of the judges who have used the term – which has been routinely employed without criticism by, among others, the courts of appeal in the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and, until *Irey III*, Eleventh Circuits – I can say I am not attempting to "slant the discussion" by doing so. Rather, in my understanding, "parsimony principle" is simply a widely recognized label for both of the requirements of § 3553(a). It is also more appropriate in the context of a criminal sentencing than alternative terms, such as the "Goldilocks principle." *See id.*

premise that I failed to give enough weight to the seriousness of the offense. But the opinion goes on to suggest that the weight I gave this factor was affected by my "idiosyncratic doubts about whether pedophiles could be deterred". *Irey III* at 1211. According to the majority, my skepticism as to the deterrent effect amounted to a "policy disagreement with the guideline recommendations," a disagreement that was only permitted if I provided "sufficiently compelling" reasons to justify it. *Id.*

A fair reading of the sentencing transcript, however, does not support this notion. In discussing the deterrence factor, I did question the vitality of deterrence for this type of crime,[12] but in doing so I was not mounting an attack on the guideline policy.[13] Expressing some misgivings as to the *likelihood* of deterrence is not at all the same thing as "questioning the *value* of deterrence" or "downplaying the importance of deterring this type of crime," as the majority puts it. *Id.* at 1212 (emphasis added).

In support of its conclusion that I did not reasonably consider the deterrence factor, the majority compares the sentence I imposed with those imposed in *United States v. Lychock*, 578 F. 3d 214 (3rd Cir. 2009) and *United States v. Goldberg*, 491 F. 3d 668 (7th Cir. 2007). Lychock, who was convicted

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[12] This, in my opinion, is a legitimate subject for rational discussion in connection with the imposition of sentence.

[13] I do have policy concerns regarding the child pornography guidelines (discussed *infra*), but they are not related to the issue of deterrence.

of possessing child pornography, had a guideline sentencing range of 30-37 months. *Lychock* at 216. The district court judge imposed a probation-only sentence, stating that a person with this "kind of psychological problem . . . is not going to be deterred by a jail term." *Id.* at 217. Similarly, the defendant in *Goldberg* faced a guideline range of 63-78 months for possession of child pornography but received a single-day sentence from a district judge who stated that "the life that I'm concerned with here, the life I can affect, is Mr. Goldberg's life." *Goldberg* at 670.

The statements I made while sentencing Irey do not even remotely resemble these flat rejections of the possibility of a deterrent effect. To the contrary, I stated that deterrence was "an appropriate consideration in this case," adding that a stiff sentence would be "in keeping with the seriousness of this offense." (Tr. at 60). Moreover, it should be noted, I made these statements in the course of sentencing Irey to more than 17 years in prison – a far cry from the probation-only and single-day sentences imposed in *Lychock* and *Goldberg*. With these facts in mind, it should be clear that I did give significant weight to considerations of deterrence, and that I imposed a sentence that, by almost any measure, is harsh enough to have such an effect.

18 U.S.C. §3553(a)(2)(C) – Protection of the Public

This subsection addresses the need for the sentence to protect the public from further crimes of the defendant. I viewed this as a mitigating factor for three basic reasons. First, because of Irey's age and the length of the sentence, he would be

relatively old when released and, as a consequence, somewhat less likely to reoffend. In addition, the mental health professionals who evaluated him believed that Irey had a low risk of recidivism. Finally, after his release, Irey would be subject to a lifetime of supervision.

Once again, it appears that I expressed my view in a manner that the majority finds objectionable. After crediting the opinion of the experts, as noted above, I said, "of course, all that is *somewhat* academic because by the time he gets out of prison, he'll be most likely at an age where recidivism would be unlikely, just from a physiological standpoint." (Tr. at 59-60) (emphasis added). Obviously, this was just my inartful way of recognizing Dr. Shaw's testimony that, after spending 15 or more years in prison, Irey would naturally experience reductions in testosterone and in his sex drive, which could affect his urge to commit similar crimes. (Tr. at 15). I did not say, nor would a reasonable reader infer that I suggested, that Irey would be "too old to do it again" or that any risk of recidivism in Irey's case was entirely "academic." *Irey III* at 1213.

The majority then proceeds to refute these "conclusions," which were not made by me, by citing information which was not presented to me. This information includes reported opinions of criminal cases involving older sex offenders, and studies suggesting older pedophiles generally have a high risk of recidivism. *Id.* at 1213-15. Next, the majority discusses cases and law review articles showing that some criminals commit additional crimes despite being on supervised release or other restrictions, and therefore such post-release conditions do not

"guarantee" that Irey will not commit more crimes when he gets out of prison. *Id.* at 1215-16. Summing up, the majority expresses disbelief that, in the face of all this contrary evidence (which, again, was not presented to me before sentencing), I could possibly find that Irey would pose a low risk of recidivism upon his release. *Id.* at 1216.

Notwithstanding this lengthy, critical dissection, and an explicit statement that my finding on this point was "wrong," the majority then stated that my finding was unassailable, because the government had never challenged it (or any others) as clearly erroneous. *Id.* Thus, the majority was obligated to accept my finding that after serving his term, Irey would pose a low risk of reoffending. *Id.* And then, after doing so, the majority concluded that I erred by failing to *increase* his sentence in response to this risk. Given the level of harm that would be inflicted, the majority asserted, any risk of recidivism was too great to bear: "The district court imposed not one extra month . . . for the purpose of protecting society and its children from further crimes by Irey. . . . Given the magnitude of the harm that will occur if Irey does commit more sexual crimes against children, that was a clear error in judgment." *Id.* at 1217.

In plain English, the majority found that a mitigating factor, supported by substantial evidence and unchallenged by the government, was trumped by its aversion to Irey's crime. Stated in terms of sentencing law, the majority again imported a § 3353(a)(1) factor – specifically, the nature and circumstances of the offense – into the analysis of a separate factor – the need to deter others. I see nothing in §3353(a) that permits such double-

counting, much less any indication that, as the majority sees it, such double-counting is required.[14]

18 U.S.C. §3553(a)(4) and (5) – The Sentencing Guidelines and Policy Statements

The majority opined that I "effectively gave the guidelines range no real weight in imposing the sentence." *Irey III* at 1218. In support of this opinion, the majority simply asserts that my explanation for deviating from the guidelines was so weak, that I effectively gave them no weight. However, the appellate court has repeatedly held that a simple statement that the sentencing judge considered all of the § 3553(a) factors was enough. *See, e.g., United States v. Sanchez*, 586 F.3d 918, 935-36 (11th Cir. 2009). Logically, even a weak explanation of the reasons for deviating from the guidelines is implicitly a statement that those guidelines were considered and ought to suffice under this Circuit's precedent.

The majority also states that I ran afoul of § 3553(a)(5) because I ignored Sentencing Commission policy statements relating to such matters as age, good works, aberrant behavior and mental health. *Irey III* at 1218-19. The majority concluded that, though these policy statements were not binding on

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[14] The majority cited a single case as supporting its "adequate protection" analysis: *United States v. Boyd*, 475 F.3d 875 (7th Cir. 2007). *Boyd* was not a § 3553(a) case. Rather, the question in *Boyd* was whether someone who randomly fired off a pistol in a vacant lot created a "substantial risk of bodily injury," thereby committing a felony under Indiana law. *Id.* at 876.

me, they all advised against a below-guideline sentence. But these policy statements, by their own terms, apply only to departure-related decisions. For example, U.S.S.G. 5H1.1 states, "Age (including youth) is not ordinarily relevant in determining whether a *departure* is warranted." (Emphasis added). Yet the majority would have this policy statement that places limits on departures also apply where a sentencing court seeks to exercise its (post-*Booker*) discretion and impose a variance – a very different situation. I am not aware of any authority or rationale for doing so.

Under the pre-*Booker* mandatory guideline scheme, the only realistic way to ameliorate an unduly harsh guideline sentence was by way of a departure. But because of limiting policy statements, departures (except for those sponsored by the prosecution) were hard to come by. Personal factors such as age, physical and mental health, aberrant behavior, diminished capacity, employment and military service were deemed not ordinarily relevant in determining whether a departure was warranted. *See generally*, U.S.S.G. Chap. 5H. In the wake of *Booker*, however, departures have lost almost all of their significance, while these personal factors have gained significance. They are inherent in the court's consideration of the nature and circumstances of the offense and the history and characteristics of the defendant and can, post-*Booker*, lead a judge to impose a sentence below the guideline range. 18 U.S.C. §3553(a)(1). *See also United States v. Gray*, 453 F.3d 1323, 1325 (11th Cir. 2006) (affirming downward variance in child pornography case, noting that district court took defendant's age, minimal prior criminal record, and

medical condition into account in imposing sentence below guideline range, and stating that these were "all valid considerations because they relate to the 'history and characteristics of the defendant.'"). The anti-departure policy statements simply have no application to the issue of a below-guideline variance. Thus, I did not consider them as a limitation on my sentencing discretion.

18 U.S.C. §3553(a)(6) – Sentencing disparity

As set forth in this subsection, the sentencing judge is required to consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." In the ordinary case, the Guidelines serve as a useful aid, providing the sentencing court with a "rough approximation of sentences that might achieve § 3553(a)'s objectives." *Rita v. United States*, 551 U.S. 338, 350, 127 S.Ct. 2456, 2465, 168 L.Ed. 2d 203 (2007). But the Guidelines are advisory, and judges have discretion to reach a result outside their suggested range based on, among other things, policy considerations. *Kimbrough v. United States*, 552 U.S. 85, 101-02, 128 S.Ct. 558, 570, 168 L.Ed.2d 481 (2007).

Describing Irey's criminal behavior as the "worst of the worst," the majority stated that it was "difficult to find a case involving sexual abuse of children that compares to this one."[15] *Irey III* at 1219-20. In the end, the majority cited thirteen

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[15] As noted previously, Irey was charged with and convicted of a single count of violating 18 § 2251(c),which prohibits "sexual exploitation of children," rather than, for example, 18 § 2243(a), which bars "sexual abuse of a minor."

Eleventh Circuit opinions where longer sentences were imposed on defendants whose criminal behavior was not as extreme as Irey's. *Id.* at 1220-21. On their face, however, all of these cases differed from Irey's in more areas than simply that of the defendant's behavior. One of the cited cases[16] occurred under the mandatory sentencing scheme that was in place prior to *Booker*, and therefore is of little relevance to this analysis. All of the others presented at least some differences that appear to weigh in favor of a longer sentence.[17] Some involved crimes other than (or in addition to) the one Irey was convicted of.[18] Other cases involved defendants convicted of multiple counts,[19] rather than the single

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[16] *United States v. Hersh*, 297 F.3d 1233 (11th Cir. 2002).

[17] Stated differently, all of the other cited cases involved facts and circumstances that, had they been present in Irey's case, would likely have led me to impose a longer sentence.

[18] For example, the defendant in *United States v. Frank*, 599 F.3d 1221 (11th Cir. 2010), was convicted of eight counts, including traveling in interstate and foreign commerce for the purpose of engaging in illicit sexual conduct with a minor (18 U.S.C. § 2423(b)) and obtaining custody or control of a minor with the intent to engage in sexually explicit conduct (18 U.S.C. § 2251A(b)(2)(A). The statutory penalty range for each of these crimes was 30 years to life. Frank was sentenced to 40 years on three of the counts and 30 years on the other five counts, to run concurrently.

[19] *See, e.g., United States v. Sarras*, 575 F.3d 1191 (11th Cir. 2009) (defendant sentenced to 100 years after being convicted at trial on three counts of violating 18

count to which Irey pled guilty, or who had a higher criminal history,[20] among other meaningful (or, at least, potentially meaningful) distinctions.[21] And those are just the distinctions that appear in the Circuit Court opinions – as opposed to, for example, the sentencing court's opinion, or the PSR or the credibility determinations on which the sentence was based.

The Sentencing Commission maintains data that provides some basis for an empirical analysis of the disparity issue.[22] Most of the data pertains to sentences imposed pursuant to U.S.S.G. § 2G2.2 for

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U.S.C. § 2251(a) and one count of violating 18 U.S.C. § 2252A(a)(5)(B)).

[20] *See e.g., United States v. Harris*, 291 Fed. App'x. 300, 302 (11th Cir. 2008) ("With a criminal history category of II and a statutory maximum term of imprisonment of 30 years for each charge, the report provided a sentencing range between 360 and 720 months of imprisonment.").

[21] It is also worth noting that in all of the cited cases, the applicable maximum statutory penalty exceeded 30 years. One of these cases – *United States v. Foster*, 209 Fed.Appx. 942 (11th Cir. 2006) – resulted in a life sentence. In the others, the defendants were sentenced to an average of 67 years, well above the 30-year maximum applicable to Irey.

[22] The Sentencing Commission data and explanatory material in regard to § 2G2.2 are attached to this opinion as Appendix A, while the data and explanatory material with regard to § 2G2.1 are attached as Appendix B. The tables in Appendix B are limited to one that covers all districts and one that covers the Eleventh Circuit. (Note that the "Re:" line in the cover letter in Appendix B mistakenly refers to § 2G2.2 rather than § 2G2.1.)

possession and distribution of child pornography. For the three-year period of Fiscal Year 2007 through Fiscal Year 2009, 3,654 sentences were imposed nationwide pursuant to § 2G2.2. Of those sentences, 43.5 percent were below the minimum sentence recommended by the Guideline, and these below-minimum sentences were, on average, 36.4 percent less than the minimum recommended sentence. Judges within the Eleventh Circuit followed essentially the same pattern, imposing below-Guideline sentences 44.2 percent of the time, and varying downward by an average of 35.2 percent when they did so. *See* Appendix A. This downward variance trend has increased dramatically, presumably reflecting increased criticism of and policy concerns with this Guideline. Nationwide in FY 2007, 30.8 percent of these sentences were below the low end of the Guideline range nationwide, while in FY 2009, 51.6 percent fell below that recommended minimum. Within this Circuit, this figure increased from 42.2 percent in FY 2007 to 51.4 percent in FY 2009.[23]

Irey was sentenced under a related but different Guideline – § 2G2.1, which covers the crime of sexual exploitation of a minor by production of sexually explicit material. During the three-year period tracked by the Sentencing Commission, only 436 sentences were imposed pursuant to § 2G2.1. The Commission staff declined to draw conclusions based on this sample, saying it was too small to do so. (*See* Appendix B). With that caveat, it is worth

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[23] The amount of downward variance of these sentences increased slightly during this period, going from about 35 percent to about 40 percent, both nationwide and within this Circuit. *See* Appendix A.

noting that sentences imposed under this Guideline do reflect that a significant number of courts –15.6 percent, or about one in six – imposed a below-guideline sentence, with an average reduction from the recommended minimum of 26.4 percent. This figure is consistent with the results of a recent survey of district judges, which found that 16 percent of the responding judges believed that guideline to be too high.[24]

These concerns are also reflected in the substantial number of reported opinions that find that the Guidelines for child pornography sentences are fundamentally flawed. As stated by Judge Adelman in *United States v. Hanson*, 561 F. Supp. 2d 1004, 1009 (E.D. Wis. 2008), "Much like the crack guideline criticized by the Supreme Court in *Kimbrough*, guideline 2G2.2 is not representative of the Commission's typical role or of empirical study." Judge Adelman also noted that, at least in some cases, the Guideline operated to suggest sentencing ranges that are "far greater than necessary to protect the public and deter defendant[s] from re-offending." *Id.* at 1011. In addition, these Guidelines require enhancements for factors that are present in almost all child pornography cases, with the result that almost all defendants end up with a guideline sentence "range" of the statutory maximum. The flawed nature of these particular guidelines has also been noted by at least one other Circuit Court. *See United States v. Dorvee*, 616 F.3d 174 (2nd Cir. 2010)

I share these policy concerns, which I have

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[24] United States Sentencing Commission, *Results of Survey of United States District Judges, January 2010 to March 2010*, http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf.

expressed in numerous prior cases dealing with sentences for the possession and distribution of child pornography pursuant to § 2G2.2. This was a production case, not a possession/distribution case, and as such the sentence was imposed under § 2G2.1 rather than § 2G2.2. Although I did not express any policy concern in regard to § 2G2.1, it is possible that my reservations about § 2G2.2 colored my judgment as to the weight that this Guideline merited. Were I given the opportunity on remand, I would reconsider the extent to which § 2G2.1 might be subject to policy-related objections.

Conclusion

I normally conclude the sentencing process by coming back to a consideration of the need for the sentence imposed to promote respect for the law and to provide just punishment for the offense. 18 U.S.C. § 3553(a)(2)(A). These are subjective factors that overlay the other statutory considerations. As I said at the sentencing, "I just do the best I can under the circumstances. It comes down to my view of what promotes respect for the law and provides just punishment. And here, as indicated, I think that a thirty year sentence . . . is greater than necessary to accomplish the statutory objectives." (Tr. at 61).

The Circuit Court acknowledged that I properly calculated the guideline score, committed no procedural error, and gave thorough and thoughtful consideration to the statutory sentencing factors.[25] Nevertheless, after demonizing Irey with

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[25] As noted previously, the government did not contest any of my findings; thus, for purposes of this appeal, they were unassailable.

over 100 references to uncharged conduct (child abuse), the Circuit Court either misconstrued or exaggerated my comments, or took them out of context, considered numerous facts and arguments never presented to me, and concluded that there were no mitigating circumstances to justify any sentence other than the 30-year guideline sentence.

This is an extraordinary and unprecedented result.[26] The Circuit Court has effectively usurped my sentencing discretion and raised serious questions regarding Irey's right to due process. I concede that the majority opinion has raised valid concerns about the reasonableness of the sentence I imposed. Were this case remanded to me for re-sentencing, I would take these concerns into account and exercise my discretion accordingly. But as it now stands, I will not be given that opportunity. Nor, it appears, will Irey be given the opportunity to confront the facts and arguments raised for the first time on appeal, which resulted in a 12 and a half year increase in his sentence.

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[26] Since *Booker*, as the majorityacknowledged, the Eleventh Circuit has reversed four sentences as being unreasonably lenient: *U.S. v. Crisp*, 454 F.3d 1285 (11th Cir. 2006) (five hours imprisonment for bank fraud); *U.S. v. Martin*, 455 F.3d 1227 (11th Cir. 2006) (seven-day sentence for billion-dollar securities fraud); *U.S. v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) (probation for receiving and distributing child pornography); and *U.S. v. Livesay*, 587 F.3d 1274 (11th Cir. 2009) (probation for participant in billion-dollar fraud scheme). Needless to say, a 17 and a half year sentence is substantially greater than the sentences originally imposed in these cases. Moreover, in none of these cases did the Circuit Court itself determine the sentence to be imposed on remand.

In his separate opinion, Judge Tjoflat states that the majority opinion's approach – *i.e.*, resentencing defendants on appeal – does "immense and immeasurable institutional damage." *Irey III* at 1267. In my opinion, it also undermines the basic tenets of sentencing law developed over the past five years, and opens a Pandora's box of new sentencing issues. I regret that my sentencing of this defendant – including any errors I made in doing so – appears to have led to this result.

* * *

It is, therefore

ORDERED that the Unopposed Motion for Continuance of Resentencing Hearing Pending Review in United States Supreme Court (Doc. 80) is **GRANTED.**

DONE and **ORDERED** in Chambers in Orlando, Florida on October 22, 2010.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:
United States Marshal United States Attorney United States Probation Office United States Pretrial Services Office Counsel for Defendant William Irey

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(2)

Supreme Court, U.S.
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No. 10-727

In the Supreme Court of the United States

WILLIAM IREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the standards applied by the court of appeals in reviewing petitioner's sentence for reasonableness are inconsistent with *United States* v. *Booker*, 543 U.S. 220 (2005), and *Gall* v. *United States*, 552 U.S. 38 (2007).

2. Whether the court of appeals abused its discretion by delaying issuance of the mandate after a panel of the court affirmed petitioner's sentence.

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In the Supreme Court of the United States

No. 10-727

WILLIAM IREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-257) is reported at 612 F.3d 1160. The vacated panel opinion of the court of appeals (Pet. App. 258-266) is reported at 563 F.3d 1223.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2010. On October 12, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 24, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was

convicted of production of child pornography, in violation of 18 U.S.C. 2251(c). He was sentenced to 210 months of imprisonment, to be followed by a life term of supervised release. A panel of the court of appeals affirmed. Pet. App. 258-266. On its own motion, the en banc court voted to rehear the case and vacated the panel opinion. *Id.* at 322-323. The en banc court vacated petitioner's sentence and remanded with instructions that the district court impose the 30-year sentence recommended by the advisory Sentencing Guidelines. *Id.* at. 1-257.

1. Between 2001 and 2005, petitioner made numerous trips to brothels in Cambodia, where he photographed and videotaped himself raping and sexually torturing at least 50 children, ranging in age from four to 16. Pet. App. 4-7; Presentence Investigation Report (PSR) ¶¶ 17-18.[1] Petitioner paid up to $1500 for the use of each child and usually purchased two or three children at a time. Pet. App. 4. After federal agents intercepted e-mails petitioner sent offering to trade child pornography, the agents searched petitioner's home and found a computer hard drive containing more than 1200 images of petitioner sexually abusing children.[2] *Id.* at 8; PSR ¶¶ 16-17. Further investigation revealed that images petitioner produced had been widely circulated on the internet, turning up in child-pornography investiga-

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[1] Petitioner did not object to the factual findings in the PSR, Pet. App. 274, and admitted in the district court that he had "done the things which are graphically spelled out in it." *Id.* at 6 n.2.

[2] Petitioner admitted that after he began having sex with children in Cambodia, he sought out child pornography on the internet. Pet. App. 77 n.25. Petitioner also acknowledged lying to his wife about credit card charges he incurred for accessing pornography websites and stealing from his company to support his sexual activities. *Id.* at 90

tions conducted by more than 100 law enforcement agencies. Pet. App. 8-9; PSR ¶ 17.

Photographs and videos petitioner produced showed him "engaged in vaginal and anal intercourse with prepubescent Asian girls" who were "tied up and bound with black and grey duct tape." Other images depicted petitioner "on a bed with several prepubescent female Asian children performing oral sex on him while he perform[ed] oral sex on them." There were images of petitioner "engag[ing] in anal and vaginal intercourse with a prepubescent Asian female with the words '9 Yo Fuck' marked on her body," and "an arrow * * * painted on her body which point[ed] to her vaginal area." In some of the images, the words "'Front,' 'Back,' 'Brown,' 'Back door,' and '9 Yo Fuck' [were written] on prepubescent girls' bodies," with "arrows pointing to the vaginal and anal areas." Petitioner also appeared "with nude prepubescent children posing as trophies." Pet. App. 6-7; PSR ¶ 18.

Other images showed petitioner "inserting a plastic green/yellow glow stick, dildos, cockroaches, and candy in the vaginal cavity of prepubescent Asian females." In several images, petitioner was depicted "inserting a plastic tube into the vagina of a prepubescent Asian female," with "the plastic tube containing cockroaches crawling into the vagina of these children." One image showed petitioner "performing vaginal intercourse on a prepubescent girl"; imbedded on the image was the phrase: "BIG COCK PUSH BUG DEEP INTO 9 YO GIRL, SHE HURT IN PANE." Pet. App. 7; PSR ¶ 18.

2. a. Petitioner pleaded guilty to production of child pornography, in violation of 18 U.S.C. 2251(c). Pet. App. 9-10. Section 2251 provides for a mandatory minimum sentence of 15 years of imprisonment and a maximum

sentence of 30 years of imprisonment. 18 U.S.C. 2251(e). The probation office prepared a presentence investigation report calculating a total offense level of 43, PSR ¶ 51, and a criminal history category of I, PSR ¶ 53, yielding an advisory Guidelines range of life imprisonment. PSR ¶ 73. Because that range exceeded the statutory maximum sentence, however, the statutory maximum of 360 months of imprisonment became the advisory sentence. *Ibid.*; see Guidelines § 5G1.1(a).

Petitioner requested a downward variance to "15-20 years in prison." Pet. App. 12; Pet. Sent. Mem. 9-11. Relying on psychological evaluations diagnosing him with pedophilia, petitioner argued that he had "limited ability to control [his] behavior," but that he was amenable to treatment and posed a relatively low risk of recidivism. Pet. App. 14-18; Pet. Sent. Mem. 9-10. The government urged the court to impose a sentence of 30 years of imprisonment, arguing that a below-Guidelines sentence would be unreasonable in light of petitioner's "horribl[e]" sexual abuse of numerous children over a period of years. Pet. App. 12-13; Gov't Sent. Mem. 5-6.

b. At sentencing, the district court adopted the PSR's factual findings and Guidelines calculations. Pet. App. 274. Several of petitioner's family members and friends testified about his past acts of generosity and kindness. *Id.* at 23-25, 286-305. Dr. Ted Shaw, a psychologist who had examined petitioner, confirmed petitioner's diagnosis as a pedophile who was sexually interested in children younger than 13. *Id.* at 23, 284. Dr. Shaw explained that pedophilia is a "well-recognized disorder," and "not a disorder that someone chooses." *Id.* at 20, 281. According to Dr. Shaw, "the availability of child images, particularly on the Internet, has fueled an epidemic of pedophilia" in "people [who] might not

have even known that they suffered from it." *Ibid.* The court asked whether "a person who acts out as a result of this condition [is] acting totally of rational free will or * * * as a result of something that is in essence an illness that he at that point has no control over?" *Id.* at 21, 282. Dr. Shaw responded that "[p]edophiles are capable of not re-offending, even if they have an urge, in the same way that compulsive dessert eaters can choose to not eat dessert." *Id.* at 22, 283. Dr. Shaw also testified that petitioner was "in the medium low to medium or moderate risk categories" for recidivism, "which is below a threshold of likely," and that by the time petitioner was released, he would have "experienced a reduction naturally in testosterone and a reduction in sex drive." *Id.* at 19, 278-279. Dr. Shaw concluded that petitioner was "amenable to treatment," *id.* at 276-278, noting that with effective treatment, many pedophiles "are in recovery and doing just fine." *Id.* at 22-23, 282-283.

Petitioner's counsel requested a below-Guidelines sentence, arguing that "the behavior of a pedophile is not totally volitional" and that "other than this disease," petitioner had lived an "exemplary life." Pet. App. 25, 307-310. Petitioner also addressed the court and apologized for his "horrible deeds." *Id.* at 27, 310.

The government argued that the Guidelines sentence of 30 years was appropriate for petitioner's repeated acts of torture directed at children as young as four years old, which "forever ruined" the children's lives. Pet. App. 27-29, 310-313. The prosecutor pointed out that petitioner was "not being prosecuted for being a pedophile," but for his crimes, and that just "[a]s an alcoholic doesn't have to drive a car, a pedophile doesn't have to put [himself] in a brothel in Cambodia." *Id.* at 27, 310-311.

c. The district court addressed the sentencing factors in 18 U.S.C. 3553(a).[3] Pet. App. 29-35, 313-318. The

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[3] Section 3553(a) provides:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant, and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner,

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for —

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code * * * [;]

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code * * * [,]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. 3553(a).

court found that petitioner's conduct was "horrific," that "[t]he victims were numerous and perhaps the most vulnerable of the world's society," and that the offense was at "the very top in terms of its seriousness and its effect on other human beings." *Id.* at 30, 314. After noting that the "young children were victims who may never, never overcome their abuse," the court stated that "[petitioner] and his family and friends are also victims here; and society at large is a victim because, as Dr. Shaw indicated, * * * the Internet * * * has made possible what Dr. Shaw describes as an epidemic of child pornography." *Ibid.* The court concluded that "in terms of the characteristics of the offense, the seriousness of it itself, the longstanding, long-term engagement in it certainly does not mitigate in favor of any leniency." *Id.* at 30-31, 314.

Turning to petitioner's history and characteristics, the court found that he had been a "good husband and father," "a good friend," and "a good person to his community," and that except for "lies and thefts" petitioner committed to "cover up his illness," he had not "engaged in any other sort of criminal conduct or conduct representing poor character." Pet. App. 31, 315. The court also found that petitioner's pedophilia, "if you look at the reports of the mental health people here and into the literature," made his conduct "not purely volitional"; rather, petitioner's actions "were due in substantial part to a recognized illness." *Ibid.* The court also found it "appropriate to credit the opinion of the mental health professionals" that petitioner was "pursuing treatment and * * * doing so apparently successfully and, in the view of the mental health professionals, is treatable and has a low risk of recidivism." *Ibid.* The court found the risk of recidivism "somewhat academic," however, not-

ing that by the time petitioner was released from prison, he would be "at an age where recidivism would be unlikely, just from a physiological standpoint." *Id.* at 32, 315.

Finally, the court considered the need for the sentence to provide adequate deterrence and protect the public. The court stated that "a serious sentence is hopefully going to deter others * * * , although when we're dealing with an illness like this, I'm not sure that that rationally follows." Pet. App. 32, 316. Nevertheless, the court stated, "deterrence is an appropriate consideration, and a stiff sentence is in keeping with the seriousness of this offense." *Ibid.* The court found that a 30-year sentence was not necessary to protect the public, given petitioner's age, his amenability to treatment, and his "low risk of recidivism." *Id.* at 32-33, 316-317. The court concluded that, in assessing "what promotes respect for the law and provides just punishment[,] * * * a 30-year sentence, given the personal factors that I have touched upon, is greater than necessary to accomplish the statutory objectives," but that "in light of the seriousness of the crimes, * * * a sentence above the mandatory minimum is called for." *Id.* at 33, 317. The court sentenced petitioner to 210 months (17½ years) of imprisonment, to be followed by a life term of supervised release. *Id.* at 33-34, 317.

3. On the government's appeal, a three-judge panel of the court of appeals affirmed petitioner's sentence. Pet. App. 258-266. The court found that the district court had given reasoned consideration to the sentencing factors in 18 U.S.C. 3553(a) and that the sentence it imposed was "within the outside borders of reasonable sentences for this case." Pet. App. 263-265.

4. The court of appeals, on its own motion, vacated the panel opinion and ordered rehearing en banc. Pet. App. 322-323. The en banc court vacated petitioner's sentence and remanded with instructions to the district court to impose a sentence within the Guidelines range, *i.e.*, 30 years.[4] *Id.* at 1-257. The court recognized that this Court's decisions in *United States* v. *Booker*, 543 U.S. 220 (2005), and *Gall* v. *United States*, 552 U.S. 38 (2007), required it to apply a deferential standard in reviewing sentences for substantive reasonableness and to reverse only where the "district court abused its discretion by committing a clear error in judgment." Pet. App. 2, 54-66. The court held that a sentencing court abused its discretion when it "fail[ed] to afford consideration to relevant factors that were due significant weight," "g[ave] significant weight to an improper or irrelevant factor," or "commit[ted] a clear error in judgment in considering the proper factors." *Id.* at 55 (quoting *United States* v. *Campa*, 459 F.3d 1121, 1174 (11th Cir. 2006) (en banc)). In order to review the district court's balancing of the Section 3553(a) factors, the court explained, it was "required to make the [sentencing] calculus" itself and to "consider the totality of the facts and circumstances." *Id.* at 56-57 (quoting *United States* v. *Pugh*, 515 F.3d 1179, 1191-1192 (11th Cir. 2008)). The court emphasized that it could not vacate a sentence "merely because we would have decided that another one is more appropriate"; rather, reversal was warranted only where the court found, "after giving a full measure of deference to the sentencing judge, that

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[4] Petitioner's resentencing has been stayed pending resolution of his certiorari petition. Pet. App. 326-353.

the sentence imposed truly is unreasonable." *Id.* at 60-61.

Applying those principles, the court of appeals held that the district court committed a clear error in judgment in weighing the Section 3553(a) factors and arriving at the sentence it imposed. Pet. App. 75-130. The court identified numerous errors in the district court's reasoning, including its mistaken view of petitioner as a "victim" (*id.* at 75-79), its reliance on the theory that pedophiles have reduced volition in committing sex crimes against children (*id.* at 79-86), and its suggestion that petitioner's family support and community ties could "remotely approach the heavy weight stacked against him for the criminal acts he committed" (*id.* at 86-92). The court found that the district court failed to give adequate weight to the seriousness of petitioner's offense and the harm inflicted on the victims (*id.* at 93-103), the importance of deterring child sex offenses (*id.* at 103-108), and the need to protect the public (*id.* at 108-118); "effectively ignored" the Guidelines range and policy statements that advised against a below-Guidelines sentence (*id.* at 118-123); created a substantial disparity with sentences imposed for comparable offenses (*id.* at 123-128); and unreasonably concluded that a 17½-year sentence was sufficient to reflect the seriousness of the offense and to promote respect for the law (*id.* at 129-130).

The court concluded that in the circumstances of this case, "[n]othing less than the advisory guidelines sentence of 30 years" would "serve the sentencing purposes set out in § 3553(a)." Pet. App. 130-136. Accordingly, it remanded with directions that the district court

resentence petitioner within the Guidelines range.[5] *Id.* at 136.

Judge Tjoflat concurred in part and dissented in part. Pet. App. 139-238. He concluded that petitioner's sentence was an abuse of discretion because the district court's findings about the seriousness of petitioner's offense—that his crime was "horrific" and at "the very top in terms of seriousness"—were impossible to reconcile with the sentence the court imposed. *Id.* at 207-212. Judge Tjoflat therefore agreed with the majority that petitioner's sentence should be vacated. *Id.* at 139-140, 212. Judge Tjoflat disagreed, however, with the majority's decision to remand with instructions that the district court impose a Guidelines sentence. *Id.* at 139, 213-238. In Judge Tjoflat's view, the majority had effectively applied de novo review and had "assume[d] the role of resentencer" by considering "evidence and arguments never offered to the district court, mak[ing] new findings, reweigh[ing] the § 3553(a) factors, and concluding as a matter of law that [petitioner] must be sentenced to 30 years' imprisonment." *Id.* at 214-232.

Judge Edmondson, joined by Judges Birch, Barkett, and Martin, dissented. Pet. App. 239-251. Judge Edmondson believed that the abuse of discretion standard of review required only "some reasonable basis in the record" for the district court's sentencing decision and that an appellate court overstepped its authority by "reweighing * * * the evidence or giving the facts a different construction * * * to grant something in the record more or less value" than the district court did. *Id.* at 240-244. Applying that standard to this case,

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[5] In a brief concurring opinion, Judge Hill agreed that petitioner's offense "demand[ed] the maximum sentence." Pet. App. 137-138

Judge Edmondson concluded that "the record as a whole was sufficient to allow * * * the imposition of something less than the maximum sentence," *id.* at 244-249, and that the sentence the district court imposed was not "beyond the outside borders" of reasonableness. *Id.* at 250. Judge Birch and Judge Barkett issued separate dissents expressing similar views. *Id.* at 252-257.

ARGUMENT

1. Petitioner contends (Pet. 12-37) that the court of appeals "effectively applied de novo review" in holding that his sentence was substantively unreasonable and that its decision conflicts with decisions of this Court and other courts of appeals. Petitioner's contention is mistaken, and further review is not warranted.

a. In *United States* v. *Booker*, this Court held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial fact-finding under mandatory federal Sentencing Guidelines. 543 U.S. 220, 226-244 (2005). To remedy that Sixth Amendment problem, *Booker* severed 18 U.S.C. 3553(b) to make the Guidelines "effectively advisory." 543 U.S. at 245. It also severed 18 U.S.C. 3742(e), which had served to reinforce mandatory guidelines by "set[ting] forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range." 543 U.S. at 259. In its place, the Court adopted appellate review for "unreasonable[ness]." *Id.* at 261.

In *Gall* v. *United States*, this Court held that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." 552 U.S. 38, 41 (2007). In applying that stan-

dard, a court of appeals must ensure that the district court "correctly calculat[ed] the applicable Guidelines range," "consider[ed] all of the § 3553(a) factors," "ma[de] an individualized assessment based on the facts presented," and "adequately explain[ed] the chosen sentence to allow for meaningful appellate review." *Id.* at 49-50. If the district court fulfilled these procedural requirements, an appellate court may assess the substantive reasonableness of the sentence. *Id.* at 51; see *Rita* v. *United States*, 551 U.S. 338, 354 (2007) (noting that "district judges at times make mistakes that are substantive" and "impose sentences that are unreasonable," and that "[c]ircuit courts exist to correct such mistakes when they occur"). In conducting its review, the appellate court may not apply a presumption of unreasonableness because the sentence under review is outside the Guidelines range and may not hold the sentence unreasonable simply because it would have concluded that a different sentence was appropriate. *Gall*, 552 U.S. at 51.

In reviewing petitioner's sentence for unreasonableness, the court of appeals recognized that the abuse of discretion standard adopted in *Booker* required it to "accord[] 'substantial deference' to the district court's sentencing decisions." Pet. App. 46 (quoting *Koon* v. *United States*, 518 U.S. 81, 97-99 (1996)). Under that standard, the court held, "[t]he relevant question * * * is not whether we would have come to the same decision if deciding the issue in the first instance * * * [but] whether the district court's decision was tenable, or, we might say, 'in the ballpark' of permissible outcomes." *Id.* at 55 (quoting *Ledford* v. *Peeples*, 605 F.3d 871, 922 (11th Cir. 2010)).

Petitioner contends (Pet. 21-27) that the court of appeals, by reweighing the Section 3553(a) factors based on its own analysis of the facts and circumstances of this case, in effect applied the same standard that led to this Court's reversal of the Eighth Circuit in *Gall*. Contrary to petitioner's suggestion, *Gall* did not prohibit an appellate court from reviewing the district court's balancing of the statutory factors as part of its determination of the substantive reasonableness of a sentence. See *Gall*, 552 U.S. at 57-59 (finding that district court "quite reasonably attached great weight" to Gall's voluntary withdrawal from drug conspiracy and "self-motivated rehabilitation"). Instead, the Court in *Gall* reversed the Eighth Circuit's decision because the court of appeals had not given "due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." *Id.* at 59-60. The court of appeals in this case emphasized the deferential nature of its review of the district court's weighing of the Section 3553(a) factors, Pet. App. 66 n.20, and recognized that under *Gall*, the appropriate question was not whether "in its view" the sentence was appropriate, but "whether the district court's weighing and the resulting sentence were reasonable." *Id.* at 62-63 n.18; see *id.* at 58 n.15 (court's "recognition of the fact that statutory criteria are at play" did not mean that it was "reviewing *de novo* the district court's balancing of those criteria").

Petitioner is incorrect in suggesting (Pet. 26 & n.2) that the court of appeals' application of the abuse of discretion standard conflicts with the decisions of other courts of appeals. Those courts recognized that review of the district court's balancing of the statutory factors

must be deferential.[6] But following the decision in *Gall*, courts of appeals have also "consider[ed] whether [a] factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case." *United States* v. *Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc). As the Second Circuit has explained, that approach "ensures that appellate review, while deferential, is still sufficient to identify those sentences that cannot be located within the range of permissible decisions." *Ibid.*; see Pet. App. 64-66 & n.20 (citing decisions from nine other circuits authorizing consideration of sentencing courts' weighing of Section 3553(a) factors and agreeing with those courts about

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[6] See *United States* v. *Zapata*, 589 F.3d 475, 488 (1st Cir. 2009) (sentencing court's "decision to emphasize the nature of the crime over the mitigating factors" was "not a basis for a founded claim of sentencing error", reasonableness requires only "a plausible sentencing rationale and a defensible result") (citations and internal quotation marks omitted); *United States* v. *Tomko*, 562 F.3d 558, 574 (3d Cir. 2009) (en banc) (court of appeals would evaluate the substantive reasonableness of a sentence "based on the reasons that the district court provided, in light of the particular facts and circumstances of [the] case" and would "reverse only when we discern an abuse-of-discretion"); *United States* v. *Douglas*, 569 F 3d 523, 527-528 (5th Cir. 2009) ("the district court must consider various factors in crafting an individualized sentence and is free to give more or less weight to factors already accounted for" in the advisory Guidelines range), *United States* v. *Muñoz-Nava*, 524 F.3d 1137, 1148 (10th Cir 2008) (sentencing court's emphasis on defendant's family circumstances was "supported by the record" and not "arbitrary, capricious, whimsical, or manifestly unreasonable"), *United States* v *Smart*, 518 F.3d 800, 807-808 (10th Cir 2008) (court of appeals "may not examine the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them, as a legal conclusion to be reviewed de novo," but instead must defer to the sentencing court's "determinations of the weight to be afforded" to its factual findings).

"the deferential nature of the review"). Petitioner's disagreement with the court of appeals' description and application of that standard to the facts of this case does not warrant further review.[7]

b. Petitioner contends (Pet. 31-33) that the court of appeals incorrectly applied "closer review" to the district court's determination that petitioner's diagnosis as a pedophile meant that his volition was impaired with respect to the commission of sexual offenses against children. The court of appeals held that the finding that petitioner's conduct was not "purely volitional" could not "reasonably carry much weight," given that petitioner had never molested a child in this country but had only done so in Cambodia, "where he could get away with sexually violating children." Pet. App. 83-84. The court went on to state that because the district court's "theory that pedophiles have reduced volition" would apply to virtually all child sex offenses, it was "more properly seen as a variance based on the judge's view that the guidelines range for crimes involving the sexual abuse of children does not properly reflect § 3553(a) factors even in mine-run cases." *Id.* at 85-86. The court of appeals recognized that this Court's decision in *Kimbrough* v. *United States*, 552 U.S. 85 (2007), "allows a district court to vary from the guidelines based solely on its judgment that the policies behind the guidelines are wrong," Pet. App. 108, but concluded that when a court varies based on a policy disagreement with the guidelines, "'closer review' of its reasoning is warranted."

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[7] Petitioner's claim (Pet. 22, 24-25) that the court of appeals gave "dispositive weight to the seriousness of the offense" is mistaken. See Pet. App. 2-3 (finding sentence substantively unreasonable "primarily, but not solely, because of the nature and extent" of petitioner's criminal conduct).

Ibid. (citing *Kimbrough*, 552 U.S. at 109). "Exercising that closer review," the court held, the district court's "view that the guidelines involving sex crimes against children are too harsh in a mine-run case because pedophiles have impaired volition" was unreasonable. *Id.* at 86. The court emphasized that it was not "rul[ing] out the possibility that a sentencing court could ever make a reasoned case for disagreeing with the policy judgments behind the child pornography guidelines," but found that in this case, "the district court did not come close to doing so." *Id.* at 106 n.32.

Kimbrough left open whether "closer review may be in order" on appeal when "the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 351). Petitioner does not dispute that more searching appellate review might be appropriate for variances based on policy disagreements with the Guidelines. Instead, he argues (Pet. 32-33) that the court of appeals erred in treating the district court's consideration of petitioner's pedophilia as a categorical rejection of the Guidelines range for child sex offenses, rather than as part of the court's individualized assessment of the circumstances of this case. Petitioner's case-specific claim that the court of appeals erred in characterizing the district court's sentencing explanation as a policy disagreement with the Guidelines does not implicate any legal issue of recurring significance that would warrant this Court's review.

c. Petitioner also objects (Pet. 27-31) to the court of appeals' use of the term "heartland," claiming that the court mistakenly applied the standard for Guidelines

departures in reviewing the district court's decision to vary from the advisory range. The court's references to the "heartland" of cases to which the guidelines for sex crimes against children were intended to apply, see Pet. App. 85, echoed this Court's statements concerning sentencing determinations that may be subject to "closer review." See *Kimbrough*, 552 U.S. at 109 ("a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply'") (quoting *Rita*, 551 U.S. at 351); see *Spears* v. *United States*, 555 U.S. 261 (2009) (per curiam) ("implication" of *Kimbrough* "was that an 'inside the heartland' departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily disagrees on a 'categorical basis') may be entitled to less respect").

Contrary to petitioner's claim (Pet. 27-28), the court of appeals did not hold that a district court is prohibited from varying based on factors that are disfavored grounds for departure under the Guidelines (*e.g.*, the defendant's age or mental condition), absent extraordinary or atypical circumstances. The court correctly recognized that while sentencing courts are required to consider the Guidelines and policy statements, provisions restricting the availability of departures "are in no way binding" on the court. Pet. App. 119-120, 123.

d. Petitioner asserts (Pet. 9, 34-37) that the court of appeals improperly "engaged in independent fact-finding" based on evidence that was not before the district court. But, as petitioner acknowledges (Pet. 34), the court of appeals repeatedly noted that the government had not challenged any of the district court's factual findings. Pet. App. 77, 82, 116. Accordingly, the

court assumed that those findings were correct for purposes of reviewing the reasonableness of petitioner's sentence.[8] *Id.* at 77-78 (court accepted finding that availability of child pornography on the internet enticed petitioner to sexually abuse children "as a given in [its] analysis"); *id.* at 82-83 & n.28 (court "accept[ed] as a fact, for this case only," finding that pedophiles' molestation of children is not "purely volitional," but is "due in substantial part" to their pedophilia); *id.* at 116-117 & n.35 (court "expressly accepted" for purposes of appeal finding that petitioner would present a low risk of recidivism at the end of a 17½-year sentence); see also *id.* at 89 (noting that the "facts about [petitioner] as a husband, father, and member of the community are not disputed").

e. Petitioner's claim (Pet. 14-15) that the court of appeals erred in instructing the district court to impose a 30-year sentence on remand also does not warrant review. Petitioner is correct that, absent highly unusual circumstances, a court of appeals that finds a sentence to be substantively unreasonable should not dictate the sentence the district court should impose on remand. But the court of appeals did not disagree with that proposition. Rather, it concluded that this case presented an "unprecedented situation," involving "both extreme

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[8] Petitioner is thus incorrect in asserting (Pet. 34-35) that the court of appeals relied on empirical evidence not presented to the district court to "dispute[]" the district court's finding that pedophiles' sexual abuse of children is not purely volitional and to find that pedophiles who have abused children are a threat to reoffend. Petitioner also faults (Pet. 34-35) the court of appeals for relying on a study that was not presented to the district court to conclude that "most sexual abuse of children is done by pedophiles," but he does not contest even now that pedophiles are more likely to molest children than are non-pedophiles.

facts and circumstances rendering any downward variance unreasonable and a pinpoint guidelines range—one where the bottom and top were the same sentence." Pet. App. 135 n.45. In these circumstances, the court held, a remand permitting the district court to resentence petitioner below the Guidelines range would likely result only in a "pointless ping pong game" of repeated appeals and remands for resentencing. *Id.* at 135 n.46.

In any event, as petitioner notes (Pet. 12), since *Gall* was decided, no other court of appeals has set a specific limit on the sentence that the district court may impose on remand. Nor is it clear that the Eleventh Circuit will follow that approach in any subsequent case. Thus, this Court's review is unwarranted.[9]

2. Petitioner contends (Pet. 38-41) that the court of appeals violated Federal Rule of Appellate Procedure 41 by failing to issue its mandate following the panel's affirmance of the district court and the expiration of the time for filing a rehearing petition. He also contends (Pet. 42-43) that the court abused its discretion by delaying issuance of the mandate for more than four months without notifying the parties that the mandate was being withheld. Those contentions are incorrect and do not warrant further review in any event.

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[9] Petitioner asserts (Pet. 15) that "in many cases," a remand for imposition of a Guidelines sentence would require the district court to "impose a sentence based on facts not found by a jury or admitted by the defendant, in violation of the Sixth Amendment." The court of appeals did not suggest that a requirement that the district court impose a Guidelines sentence on remand would be justified outside the "extreme" circumstances of this case, Pet. App. 131, much less "in many cases," and petitioner does not claim that there was a Sixth Amendment violation in his case.

The panel issued its decision affirming petitioner's sentence on March 30, 2009. Pet. App. 258. On August 12, 2009, the court of appeals, on its own motion, vacated the panel opinion and ordered rehearing en banc. *Id.* at 322-323. Petitioner does not dispute the court's authority to order to order sua sponte that the case be reheard en banc. Fed. R. App. P. 35(a); see 28 U.S.C. 46(c); *Western Pac. R.R.* v. *Western Pac. R.R.*, 345 U.S. 247, 262 (1953). Although Rule 35 requires petitions for rehearing to be filed within a specified time period, Fed. R. App. P. 35(c), it sets no time limit for orders granting en banc review sua sponte.

The court's delay in issuing its mandate while it considered whether to grant rehearing in this case also did not violate Federal Rule of Appellate Procedure 41, as petitioner contends. Rule 41 requires an appellate court to issue its mandate within seven days after the time for filing a rehearing petition expires, but it authorizes the court to "shorten or extend the time." Fed. R. App. P. 41(b). The court of appeals thus had discretion to withhold its mandate following the panel's decision affirming petitioner's sentence. Nor does Rule 41 require a court of appeals to notify the parties that it is delaying issuance of the mandate, as petitioner suggests. As the Fifth Circuit has explained, the rule "grants [the court] power to shorten or enlarge the specified period by order," but "[t]here is no requirement in the rule that such an order be formal [or] written, or that the parties be given notice of it, though this might be desirable." *Sparks* v. *Duval County Ranch Co.*, 604 F.2d 976, 979 (5th Cir. 1979), aff'd on other grounds *sub nom. Dennis* v. *Sparks*, 449 U.S. 24 (1980).

Petitioner relies (Pet. 39-42) on this Court's decision in *Bell* v. *Thompson*, 545 U.S. 794 (2005), but that case

involved a different issue. In *Bell*, the court of appeals affirmed the district court's dismissal of a federal habeas corpus petition stemming from a state murder conviction and death sentence, but stayed the issuance of its mandate pending disposition of the defendant's petition for certiorari. *Id.* at 796-800. After this Court denied certiorari and a petition for rehearing, the court of appeals withheld its mandate for more than five months without entering a formal order and then issued an amended opinion remanding the case to the district court. *Id.* at 800-801. This Court reversed, holding that the court of appeals had "abused any discretion Rule 41 arguably granted it to stay its mandate, without entering a formal order, after this Court had denied certiorari." *Id.* at 813-814. Unlike in *Bell*, the court's delay in issuing its mandate in this case did not occur after this Court had denied certiorari, but while the case was still before the court of appeals. Thus, the only reasonable assumption by the parties was that the court had not issued its mandate because it was considering whether to exercise its authority to rehear the case en banc. Cf. *Bell*, 545 U.S. at 804-806 (after denial of certiorari, parties reasonably assumed that federal habeas proceedings were complete). And unlike in *Bell*, where the parties and the state court expended "considerable time and resources" in litigating issues relating the defendant's pending execution "on the mistaken assumption that the federal habeas proceedings had terminated," *id.* at 800, 805, 812, petitioner does not identify any prejudice he suffered from the delay in issuing the mandate in his case.

But even if the court of appeals had been required to give notice of its delay in issuing the mandate, the issue would not warrant review. Petitioner's case-specific

claim that the court of appeals exceeded its discretion raises no important issue of federal law warranting this Court's review, particularly because, as petitioner notes (Pet. 42), the Eleventh Circuit has since amended its rules to require a docket entry alerting the parties that the mandate has been withheld. Pet. App. 324-325; 11th Cir. R. 35, I.O.P. 6 ("If a petition for rehearing or a petition for rehearing en banc has not been filed by the date that [the] mandate would otherwise issue, the Clerk will make an entry on the docket to advise the parties that a judge has notified the clerk to withhold the mandate.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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WILLIAM IREY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY TO BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I.

In reversing a below-guideline sentence as substantively unreasonable and ordering the district court to impose a 30-year guideline sentence on remand, the Eleventh Circuit effectively applied *de novo* review, in conflict with the "deferential standard of review" adopted by this Court and applied by other circuit courts.

The Eleventh Circuit concluded that the substantial mitigating evidence Mr. Irey presented at sentencing could not reasonably justify a sentence of even one day less than the maximum permissible guideline sentence of 30 years' imprisonment. Pet.App.135-36. To reach this conclusion, the *en banc* court applied what "amounts to *de novo* review" of the district court's consideration and weighing of the 18 U.S.C. § 3553(a) factors "in the guise of abuse of discretion." Pet.App.220 (Tjoflat, J., concurring and dissenting). Contrary to the arguments set forth in the Brief of the United States in Opposition ("BIO"), the Eleventh Circuit's standard of review violates *Gall v. United States*, 552 U.S. 38 (2007), and conflicts with other circuits' post-*Gall* review of sentences.

A. **The Eleventh Circuit effectively applied a *de novo* standard of review instead of the requisite deferential abuse of discretion standard adopted by this Court.**

The government argues that the Eleventh Circuit applied *Gall*'s deferential abuse-of-discretion standard because the court "recognized" that standard. BIO 13 (citing Pet.App.46). That argument must meet the same fate as it did in *Gall*. *See* 552 U.S. at 56 (reversing Eighth Circuit's decision that "correctly stated the appropriate standard of review was abuse of discretion, [but] engaged in an analysis that more closely resembled *de novo* review"). Like the Eighth Circuit in *Gall*, the Eleventh Circuit failed to demonstrate the required level of deference when it conflated the roles of the district and appellate courts by conducting its own detailed review of the record and the § 3553(a) factors, independently finding new facts, reweighing the § 3553(a) factors, and independently assessing whether there were sufficiently "compelling" justifications to support a variance. *See* Pet. 9-10,21; Pet.App.50,55-57,72,84-86,88,91-93,103-04,111-18,121-23,129,130. Tellingly, the Eleventh Circuit created its standard of review from a number of unrelated contexts, including the standard improperly used by the Eighth Circuit in *Gall*, in order to engage in the review it applied here. *See* Pet. 15-27.

The government next attempts to defend the Eleventh Circuit's analysis by asserting that "*Gall* did

not prohibit an appellate court from reviewing the district court's balancing" of the § 3553(a) factors. BIO 14. The government's argument is incorrect, and it misses the point. The Eleventh Circuit did not simply review the district court's "balancing" of the statutory factors; it weighed those factors anew, much like the Eighth Circuit did in *Gall*.

In *Gall*, this Court observed that the Eighth Circuit had found that the district court "gave too much weight" to certain facts, "gave significant weight to an improper factor," and improperly weighed certain factors. *See* 552 U.S. at 45, 56-57. This Court reversed, stating that the Eighth Circuit "should have given due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." *Id.* at 59-60. Likewise, the Eleventh Circuit's rigorous review of the sentence imposed in this case does not afford the district court the deference it is due.

The Eleventh Circuit's misapplication of *Gall* is further evident when its *en banc* decision is compared to other circuit decisions that properly apply *Gall*. Contrary to the government's argument, BIO 14-15, this comparison also demonstrates a circuit conflict. For example, before *Gall*, the Tenth Circuit effectively applied the same analysis as the Eleventh Circuit did here. *Compare United States v. Smart*, 518 F.3d 800, 806 (10th Cir. 2008) (explaining its pre-*Gall* reasonableness review), *with United States v. Irey*, No.

08-10997 (11th Cir. 2010) (*en banc*) (Pet.App.1-136) (applying an analysis not materially different from the Tenth Circuit's pre-*Gall* review).

After *Gall*, the Tenth Circuit concluded that this "rigorous form of review" cannot be reconciled with and was "substantially invalidate[d]" by *Gall* and *Kimbrough v. United States*, 552 U.S. 85 (2007). *Smart*, 518 F.3d at 802. The appellate court thus recognized that its "own reading of the factual record, in place of the district court's reading, ignores the trial judge's 'superior position to find facts and judge their import under § 3553(a) in the individual case.'" *Id.* at 807 (quoting *Gall*, 552 U.S. at 51). To afford "both formal and practical deference to the sentencing court's assessment of the facts under § 3553(a)," the Tenth Circuit explained, an appellate court may not simply "credit" the sentencing court's "raw findings of individual fact" while examining *de novo* "the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them[.]" *Id.* at 807-08. Recognizing *Gall*'s important distinction between the roles of the district and appellate courts, the Tenth Circuit stated that "an appellate court's 'disagree[ment] with the District Judge's conclusion that consideration of the § 3553(a) factors justified . . . a marked deviation from the Guidelines range' is simply not enough to support a holding that the district court abused its discretion." *Id.* at 808. Rather, the appellate court must defer to "a district court's factual findings" as well as "its

determinations of the weight to be afforded to such findings." *Id.*; *see also United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (*en banc*) (stating that appellate courts "do not consider what weight we would ourselves have given a particular factor. . . . Rather, we consider whether the factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case"); *United States v. Gardelli*, 545 F.3d 1089, 1090, 1093-94 & nn.4-5 (D.C. Cir. 2008) (affirming a below-guideline sentence under "narrow and deferential" substantive appellate review, and citing cases from other circuits applying this review; rejecting "Guidelines-centric appellate approaches," such as requiring extraordinary circumstances to justify sentences outside the guidelines; observing that *Gall* assigned district courts – not appellate courts – the role of ensuring that the justification for a variance "is sufficiently compelling to support the degree of the variance").

Unlike the circuits that correctly apply *Gall*, the Eleventh Circuit has failed to integrate *Gall*'s teachings into its practice. Rather than deferring to the district court's determinations of the weight to be afforded to its factual findings, the Eleventh Circuit usurped the district court's role by weighing the facts and § 3553(a) factors anew. *See* Pet.App.214-19 (Tjoflat, J., concurring and dissenting) (pointing out that the majority's conclusion – that the weight of facts

under § 3553(a) presents a question of law – conflicts with this Court's precedent and at least one circuit).

The government tries to deflect the Eleventh Circuit's overreaching by noting that, despite its conclusions that some of the district court's findings of fact were clearly erroneous, the Eleventh Circuit ultimately *said* it would nevertheless assume the district court's findings were correct because the government did not contest those findings. BIO 18-19. As Judge Tjoflat observed, however, it makes little sense for the *en banc* majority to consider new evidence and arguments if it actually accepted the district court's findings. Instead, the *en banc* majority's consideration of new evidence and its harsh criticism of the district court's findings indicate that it rejected them, and that its rejection of them played an important role in its analysis and improperly contributed to its ultimate decision to reverse Mr. Irey's sentence. Pet.App.223-24 n.93 (Tjoflat, J., concurring and dissenting).

The government has thus provided no legitimate justification for the Eleventh Circuit's rigorous form of review. Since that form of review violates *Gall* and conflicts with other circuits, certiorari review is warranted.

B. The Eleventh Circuit misapplied "closer review" to the district court's consideration of mitigating factors.

The government argues that the Eleventh Circuit's application of a heightened standard of review – "closer review" – to the district court's consideration of mitigating factors does not warrant review by this Court because the Eleventh Circuit's application of "closer review" below is merely "case-specific." BIO 17. The government is incorrect.

In *Kimbrough*, this Court stated in *dictum* that "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." 552 U.S. at 109. Here, however, the district court plainly did not base the sentence imposed on its "view" of the policy merits of the applicable guideline or on a categorical disagreement with the applicable guideline. Rather, it considered mitigating factors relevant to Mr. Irey as a person (his mental disorder, successful participation in treatment, low risk of recidivism with treatment, and history as a good husband, father, and contributor to the community), which it was required to consider under § 3553(a)(1) and which are relevant to the purposes of sentencing under § 3553(a)(2). This Court has never suggested that its "closer review" *dictum* might apply when a district court did *not* express a "view" on the

guideline's policy merits. Moreover, "masking . . . categorical policy disagreements as 'individualized determinations' . . . is institutionalized subterfuge" and not "an acceptable sentencing practice." *Spears v. United States*, 129 S. Ct. 840, 844 (2009). The Eleventh Circuit incorrectly assumed that the district court engaged in an unacceptable sentencing practice in order to give itself license to apply a stricter standard of review than this Court's holdings allow and to apply this Court's *dictum* in a situation in which this Court has never suggested it could possibly apply.[1]

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[1] The government also contends that Mr. Irey "does not dispute that more searching appellate review might be appropriate for variances based on policy disagreements with the guidelines. BIO 17. This contention is irrelevant since the district court did not base its variance on a policy disagreement with the guidelines. In any event, Mr. Irey does not concede that closer review might be appropriate whenever a district court varies from the guideline range based on a policy disagreement. *See* Pet. 32 (emphasizing that "the Court has never held that closer review is required in any case"). This Court has made clear that a variance based on a disagreement with a guideline that does "not exemplify the Commission's exercise of its characteristic institutional role" is entitled to the same respect on appeal as any other variance. *See Kimbrough*, 552 U.S. at 109 ("crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role"); *Spears*, 129 S. Ct. at 843 ("*Kimbrough* thus holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect."). And in *Pepper v. United States*, 131 S. Ct. 1229, 1247 (2011), the Court reiterated, without mentioning, much

If the government is correct that the Eleventh Circuit's use of "closer review" in these circumstances implicates no legal issue warranting review by this Court, then virtually *every* downward variance based on a mitigating offender characteristic or offense circumstance could be subjected to stricter scrutiny by appellate courts on the theory that it represents a disagreement with the applicable guideline range. This is because most mitigating factors are omitted from the guidelines themselves and are discouraged or prohibited by policy statements as grounds for departure. *See* Pet. 28-30. To transform downward variances based on individualized mitigating factors into "policy disagreements" with the guidelines and subject them to "closer review," as the Eleventh Circuit did, would effectively require that "the Guidelines *must* be followed even where the district court's application of the § 3553(a) factors is entirely reasonable" – a requirement patently inconsistent with this Court's decisions. *See Kimbrough*, 552 U.S. at 113-14 (Scalia, J., concurring).

Additionally, the government's contention that this issue does not warrant further review because it is case-specific is undermined by the Eleventh Circuit's recent decision in *United States v. Dean*, 2011 WL

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less endorsing, "closer review," that "a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views . . . particularly . . . where . . . the Commission's views rest on wholly unconvincing policy rationales."

902102 (11th Cir. Mar. 16, 2011). There, the district court did *not* vary from the guideline range. Just as in *Irey*, therefore, this Court's *dictum* regarding "closer review" could not possibly apply. Yet, *Dean* relied on *Irey*'s discussion and application of "closer review" to hold that the within-guideline sentence was reasonable. The Eleventh Circuit thus applied *Irey*'s substantive conclusions regarding the soundness of the applicable guideline – reached there only through improperly exercised "closer review" – in another case in which "closer review" cannot possibly apply.[2] Mr. Irey requests that this Court grant certiorari to make clear that the Eleventh Circuit is wrong to apply "closer review" in these situations.

C. Mandating a particular sentence on remand is in direct conflict with this Court's decisions in *Gall* and *Pepper*, and in many cases would violate the Sixth Amendment.

The remedy the Eleventh Circuit chose further illustrates the overreaching new law the court created. The Eleventh Circuit effectively resentenced Mr. Irey by mandating that, on remand, the district court impose a 30-year guideline sentence, *and nothing less*. Therefore, the Eleventh Circuit violated *Gall* and *Pepper* both by improperly substituting its own judgment for that of the district court, whose

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[2] The Eleventh Circuit has now cited *Irey* at least 48 times, further indicating the need for certiorari review to halt the Eleventh Circuit's use of its improper standard of review.

overarching duty is always to impose a sentence "sufficient, but not greater than necessary" for *this particular offender*, and by entering a remand order that improperly prohibits the district court from considering evidence critical to its overarching duty on remand.[3] *See Pepper*, 131 S. Ct. at 1239-40 ("[T]he punishment should fit the offender, not merely the crime."); *id.* at 1242 (expressly recognizing the relationship between a mitigating factor (post-sentencing rehabilitation) and the district court's statutory duty to impose a sentence that is *not greater than necessary* to serve § 3553(a)(2)'s sentencing purposes, both at the original sentencing and on remand); *Gall*, 552 U.S. at 51-52 (making clear that the decision regarding the appropriate sentence under § 3553(a) should be made by the district court, not the appellate court, because the district court is in a "superior position to find facts and judge their import under § 3553(a) in the individual case").

Moreover, since the advisory guideline range is often based on contested judicial factfindings, the remedy employed by the Eleventh Circuit – remand for imposition of a guideline sentence – would violate

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[3] *See* Pet.App.73-74 & n.22 ("emphatically" disagreeing with the "'parsimony principle' terminology and the concept that underlies it," because it ignores the requirement that the sentencing court "be generous enough to avoid [a sentence] that is too short" and stating that a "more accurate term, if one is needed, might be 'the Goldilocks principle,' because the goal is to lock in a sentence that is not too short and not too long, but just right to serve the purposes of § 3553(a)").

defendants' Sixth Amendment rights in many cases where the contested facts were not found by a jury or admitted by the defendant. The government unsuccessfully attempts to downplay the Sixth Amendment implications of the Eleventh Circuit's extraordinary remedy by arguing that the unique facts of this case support that remedy and that Mr. Irey is not asserting a Sixth Amendment violation in this case. But no facts, no matter how unique, justify an appellate court disregarding this Court's holdings.

Furthermore, *Pepper* demonstrates that this Court is concerned with the "potential" for future violations of the Sixth Amendment. 131 S. Ct. at 1244 (invalidating 18 U.S.C. § 3742(g)(2) because of the "possibility" that its application would result in a Sixth Amendment violation in some cases). In light of the need to avoid Sixth Amendment violations in all cases, the government's case-specific arguments against granting certiorari review should be rejected.

II.

The Eleventh Circuit exceeded its authority by delaying the issuance of the mandate without providing the parties with notice of its intention to do so and abused its discretion by failing to take any action for more than four months after the court issued its original panel decision.

The government contends that this issue does not warrant certiorari review because it is case-specific and the Eleventh Circuit has since amended its rules to require a docket entry alerting the parties that the mandate has been withheld. BIO 20-23. The government's argument is incorrect.

First, the Eleventh Circuit amended its rules on August 1, 2010, two days after rendering its *en banc* decision. Pet.App. 324-25. The timing of that amendment provides a strong indication that the Eleventh Circuit recognized that the procedure it employed in Mr. Irey's case was improper.

Second, the fact that the Eleventh Circuit has amended its rules to require a docket entry does not establish that this issue will not reoccur in other circuits. A review of the other circuit courts' local rules and internal operating procedures indicates that the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits do not have a similar rule. *See* http://www.ca1.uscourts.gov;

http://www.ca2.uscourts.gov;
http://www.ca3.uscourts.gov;
http://www.ca4.uscourts.gov;
http://www.ca6.uscourts.gov;
http://www.ca7.uscourts.gov;
http://www.ca8.uscourts.gov;
http://www.ca9.uscourts.gov;
http://www.ca10.uscourts.gov;
http://www.cadc.uscourts.gov.

Accordingly, the extent of a circuit court's authority under Rule 41 remains an important federal question worthy of further review.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, Mr. Irey respectfully requests that this Honorable Court grant certiorari review.

Respectfully submitted,

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